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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 447

WHEELING STEEL CORPORATION, APPELLANT,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF
OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED DECEMBER 6, 1948.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 25, 1949.

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[fols. 1-2] [File endorsement omitted]

[fol. 3] **IN SUPREME COURT OF OHIO**

No. 31079

WHEELING STEEL CORPORATION, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee

PETITION FOR ALLOWANCE OF AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed November 2, 1948

To the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio:

Your petitioner, Wheeling Steel Corporation, a Delaware corporation, respectfully represents that it is the appellant in the above captioned cause and that on August 4, 1948, the Supreme Court of Ohio, the highest court in said state in which a decision in said cause could be had, rendered a certain judgment therein, against appellant and in favor of appellee, the Tax Commissioner of Ohio, affirming that certain decision of the Board of Tax Appeals of Ohio rendered on April 7, 1947 and numbered 9681 on the docket of said Board, in which said Board of Tax Appeals affirmed a property tax assessment made by appellee against certain intangible property belonging to appellant.

On August 17, 1948, appellant filed with the Supreme Court of Ohio its Application for Rehearing, which was denied by said Court on October 6, 1948. Said judgment of said Court became operative and final on October 6, 1948.

[fol. 4] In said cause there is drawn in question the validity of Sections 5328-1 and 5328-2 of the General Code of Ohio, on the ground of their being repugnant to the Constitution of the United States in this, that as construed and applied said statutes burden and obstruct interstate commerce and deprive appellant of its property without due process of law and deny appellant the equal protection of the laws of Ohio, and the judgment of the Supreme Court of Ohio is in favor of the validity of said statutes and against the constitutional rights, privileges and exemptions specifically claimed by appellant.

Wherefore, appellant prays for the allowance of an appeal from the Supreme Court of Ohio to the Supreme Court of the United States in order that said decision of the Supreme Court of Ohio may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Ohio may be sent to the Supreme Court of the United States, as provided by law.

Dated at Columbus, Ohio, this 1st day of November, 1948.

Wheeling Steel Corporation, by Dargusch, Caren, Greek & King; Carlton Dargusch, John Caren, Its Attorneys.

[fol. 5] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 2, 1948

Appellant, Wheeling Steel Corporation, respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of Ohio in the above captioned cause there is manifest error in this, to wit:

1. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with Article I, Section 8 of the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they subject to taxation in Ohio receipts from interstate activities carried on outside of Ohio, thus subjecting the property to the risk of a double tax burden to which intrastate commerce is not exposed and thereby burdening and obstructing interstate commerce.

2. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they require the assessment [fols. 6-50] of a property tax against intangible property which was not within the jurisdiction of the state of Ohio, thereby depriving appellant of its property without due process of law.

3. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they require the imposition of a property tax against the intangible property of appellant, a non-resident, but exempt identical property of a resident from taxation in Ohio, thereby denying appellant equal protection of the laws of Ohio.

For which errors said Wheeling Steel Corporation prays that said final judgment of the Supreme Court of Ohio be reversed and a judgment rendered in favor of said Wheeling Steel Corporation; and for costs.

Dated at Columbus, Ohio this 1st day of November, 1948.

Dargusch, Caren, Greek & King; Carlton Dargusch;
John Caren, Attorneys for Appellant, Wheeling
Steel Corporation.

[fols. 51-58] Citation in usual form filed Nov. 4, 1948, omitted in printing.

[fol. 59] (File endorsement omitted).

[fol. 60] IN SUPREME COURT OF OHIO

No. 31079

WHEELING STEEL CORPORATION, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

ORDER ALLOWING APPEAL—Filed Nov. 2, 1948

The appellant in the above entitled case having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled case by the Supreme Court of Ohio on the 6th day of October, 1948, upon the opinion and decision of said Supreme Court of Ohio of August 4, 1948, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors,

Prayer for Reversal and Statement as to Jurisdiction pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided:

It is ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme [fols. 61-66] Court of the United States so that he shall have the same in said Court within forty days of the date hereof.

And it is further ordered that security for costs on appeal be fixed at the sum of \$500.00, and that upon approval of bond in said amount this order shall operate as a super-sedeas.

Dated at Columbus, Ohio, this 1 day of November, 1948.

(S.) Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol: 67] (File endorsement omitted).

[fol. 68] IN SUPREME COURT OF OHIO

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 3, 1948

To the Clerk of the Supreme Court of Ohio:

You are hereby requested to make a transcript of the record in the above entitled case, the same to be filed in the Supreme Court of the United States pursuant to the appeal allowed therein on November 1, 1948, by the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, and, without limiting the generality of the foregoing request, to include in said transcript the following:

1. The transcript of the record of the proceedings before the Tax Commissioner of Ohio in the matter of the application of Wheeling Steel Corporation for review and redetermination for the year 1942, the same being numbered 544 on the docket of said Commissioner;

2. The transcript of the record of the proceedings before the Board of Tax Appeals of Ohio in the appeal to said Board from the Tax Commissioner of Ohio in the case of [fols. 69-70] Wheeling Steel Corporation vs. C. Emory Glander, Tax Commissioner of Ohio, the same being numbered 9861 on the docket of said Board.

Said transcript is to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States and is to be filed with the Clerk of the Supreme Court of the United States on or before the 11th day of December, 1948.

Dated at Columbus, Ohio, this 3rd day of November, 1948.

Dargusch, Caren, Greek and King; Carlton S. Dargusch; John Caren.

[fols. 71-73] Bond on appeal for \$500.00, approved and filed Nov. 3, 1948, omitted in printing.

[fol. 74] IN SUPREME COURT OF OHIO, JANUARY TERM, 1947

31079

Title of Case: WHEELING STEEL CORPORATION, Appellant,
v. C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

Action: Appeal from the Board of Tax Appeals.

Attorneys: Dargusch, Caren, Greek & King, John Caren,
44 E. Broad St., Columbus 15, Ohio. Hugh S. Jenkins,
Daronne R. Tate, Columbus, Ohio.

MEMORANDA OF PLEADINGS, &C FILED, WRITS ISSUED, &C.

May 2, 1947. Notice of appeal & proof of service filed.

May 15, 1947. Transcript of Record & Abstract of Docket of Board of Tax Appeals filed.

May 15, 1947. Cause docketed.

May 19, 1947. Papers taken by Rodenfels. 6/19/47 returned.

June 4, 1947. Application of Squire, Sanders & Dempsey for leave to file brief Amicus Curiae herein filed.

June 4, 1947. Entry granting Squire, Sanders & Dempsey

leave to file brief Amicus Curiae herein on or before June 25, 1947. Carl V. Weygandt, C.J. J. 38, Page 401.

June 12, 1947. Entry extending time for filing printed record herein to July 14, 1947. E. S. Matthias, J. J. 38, Page 410.

June 19, 1947. Printed record & proof of service filed.

June 26, 1947. Printed brief Amicus Curiae of Squire, Sanders & Dempsey, (same as 31037-31081) filed. 7/5/47 P. S. filed.

[fol. 75] July 10, 1947. Entry extending time for appellant's printed brief to Aug. 20, 1947. E. S. Matthias, J. J. 38, Page 428.

July 22, 1947. Receipted bill for printing of record filed.

Aug. 13, 1947. Entry extending time for filing appellant's printed brief to Sept. 8, 1947. E. S. Matthias, J. J. 38, Page 449.

Sept. 4, 1947. Appellant's printed brief filed. 9/11/47 P. S. filed.

Oct. 3, 1947. Appellee's printed brief & A of S filed. 10/6/47 P. S. filed.

Aug. 4, 1948. Decision affirmed. J. 38, Page 685.

Aug. 10, 1948. Notified application for rehearing to be filed.

Aug. 17, 1948. Application for rehearing filed.

Oct. 6, 1948. Rehearing denied. J. 39, Page 2.

Nov. 2, 1948. Petition for appeal filed.

Nov. 2, 1948. Assignment of errors filed.

Nov. 2, 1948. Jurisdictional statement filed.

Nov. 2, 1948. Order allowing appeal filed.

Nov. 2, 1948. Citation issued.

Nov. 2, 1948. Certificate as to Federal Questions considered and decided filed.

Nov. 3, 1948. Notice to appellee as required by rule 12; paragraph 3 of U. S. Supreme Court filed.

Nov. 3, 1948. Proof of service of all papers filed.

Nov. 3, 1948. Precept for transcript of record filed.

Nov. 3, 1948. Bond, in sum of \$500.00, National Surety Corporation as surety, approved and filed.

Nov. 4, 1948. Citation returned and filed.

[fol. 76]

JOURNAL ENTRIES

31079. Wednesday, June 4, 1947. Entry. Upon application and for good cause shown, it is ordered that Squire,

Sanders & Dempsey are hereby given leave to file brief Amicus Curiae herein on behalf of appellant on or before June 25, 1947. Carl V. Weygandt, Chief Justice. J. 38, Page 401.

31079. Thursday, June 12, 1947. Entry. Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record herein be, and the same hereby is, extended to July 14, 1947. Edward S. Matthias, Judge J. 38, Page 410.

31079. Thursday, July 10, 1947. Entry. Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's brief herein be, and the same hereby is, extended to August 20, 1947. Edward S. Matthias, Judge J. 38, Page 428.

31079. Wednesday, August 13, 1947. Entry. Upon application of appellant and for good cause shown, it is ordered that the time for filing appellant's printed brief herein be, and the same hereby is, extended to September 8, 1947. Edward S. Matthias, Judge J. 38, Page 449.

JUDGMENT

31079. Wednesday, August 4, 1948. Appeal from the [fol. 77] Board of Tax Appeals. This cause came on to be heard upon the transcript of the record of the Board of Tax Appeals of Ohio and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed for the reasons stated in the opinion rendered herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals of Ohio, to carry this judgment into Execution. J. 38, Page 685.

ORDER DENYING REHEARING

31079. Wednesday, October 6, 1948. Rehearing Docket. Upon consideration of the application for rehearing herein, it is ordered by the Court that rehearing be, and the same hereby is, denied. J. 39, Page 2.

[fol. 78]- [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE OF APPEAL—Filed May 2, 1947

Wheeling Steel Corporation, a Delaware corporation, hereby gives notice of appeal to the Supreme Court of Ohio from a decision of the Board of Tax Appeals dated May 7, 1947, of which the following is a true and correct copy, viz:

“BEFORE THE BOARD OF TAX APPEALS DEPARTMENT OF
TAXATION OF OHIO

No. 9681

ENTRY

April 7, 1947.

WHEELING STEEL CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio,
Appellee

This cause came on for hearing upon an appeal from the final order of the tax commissioner denying an application for review and redetermination with respect to an assessment made by him against the appellant on its taxable credits consisting of notes or accounts receivable and prepaid items, which assessment amounted to \$6,280.35. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, the stipulation of facts and briefs of counsel.

From the stipulation of facts it appears that appellant is a Delaware corporation, in which state it [fol. 79] maintained a statutory office. Its principal office and place of business were located in Wheeling, West Virginia, where all the officers had their offices, where all meetings of shareholders, directors and the executive committee were held and where all dividends were declared. All of appellant's general books and ac-

counting records were kept at the Wheeling office. All credit was granted and collections of accounts and notes receivable, etc. were made there. Appellant operated four manufacturing plants in West Virginia and four in Ohio. It maintained sales offices in twelve states, one of which offices was located in Cincinnati, Ohio.

The stipulation also contains the following:

'Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax-listing day in 1942 resulted either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. * * *

'All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. The sales offices had no powers or duties with respect to the creation, custody, collection or extinguishment of said notes.

'All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avails of said accounts receivable were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of

said accounts receivable were kept at the sales offices which had no powers or duties with respect to the collection thereof.

[fol. 80] 'All of said notes and accounts receivable arose in the ordinary course of appellant's business of making sales of its products.

'Payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants. Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose. All commercial and other accounts payable were paid by checks signed at and issued at the Wheeling office.

'All policies of insurance against loss or liability purchased by appellant were negotiated at the Wheeling office where they were delivered, paid for and kept. Such policies were blanket policies covering properties and potential risks in West Virginia, Ohio and other states.

'All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942.'

In its consolidated inter-county return appellant allocated all of its accounts receivable and prepaid items outside of Ohio. The tax commissioner, on the other hand, determined that certain of the credits owned by appellant and its subsidiaries had their situs in Ohio and that the amount thereof which was, therefore, taxable in this State was \$2,093,450, making an assessment thereon of \$6,280.35, which is the subject of this appeal. The amount of such credits was arrived at as follows:

'In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of \$5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and accounts receivable resulted from the sale of products shipped from appellant's Ohio manufacturing plants; that \$225,328 in prepaid insurance

had arisen out of business transacted in Ohio inasmuch as it represented prepaid premiums for insurance on appellant's Ohio manufacturing plants. The total of the credits so determined to have arisen out of business transacted by appellant in Ohio was \$5,475,853 and was 47.623% of all of appellant's and its subsidiaries' notes, accounts receivable and prepaid items which amounted to \$11,498,424 on tax-listing day in 1942. Appellee then computed said assessment by deducting, \$7,102,540, the total of appellant's and its subsidiaries' accounts payable, from \$11,498,424, the total of notes and accounts receivable and prepaid items, and assessing 47.623% of the remainder, to-wit, \$2,093,450, as credits taxable in Ohio.'

One question presented is whether the tax commissioner erred in allocating to Ohio the accounts receivable which arose from sales of goods which were shipped from its plants in this State. In determining this question the Board is bound to follow the statutes applicable thereto, as construed by the Supreme Court. Section 5328-1, General Code, provides in part as follows:

'Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation;'

It is clear that under this statute intangibles owned by a non-resident cannot be taxed unless they are both used in business in this State and arise out of business transacted here. Section 5325-1, General Code, reads in part as follows:

'Moneys, deposits, investments, accounts receivable and prepaid items and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended

to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.'

Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. *Ransom & Randolph Co. v. Evatt*, 142 O.S. 398, 27 O.O. 348, 37 O.L.A. 481, 10 O. Supp. 25, 52 N.E. (2d) 738; *Haverfield Company v. Evatt*, 143 O.S. 58, 28 O.O. 16, 54 N.E. (2d) 149.

We come now to Section 5328-2, General Code, which provides, with reference to the situs of accounts receivable, as follows:

[fol. 82]. 'Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

'In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state. * * *

Said section also provides that:

'The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this

state to property of a person residing outside of this state in a like case and under similar circumstances.'

This reciprocal provision indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this Board has no right to declare a statute unconstitutional. *Hillsborough Township v. Cromwell*, 90 L. ed. 298; *Schwartz v. Essex County Board of Taxation* 129 N.J.L. 129, affirmed 130 N.J.L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court. In the case of *National Cash Register Company v. Evatt*, 145 O.S. 597, 31 O.O. 218, 42 O.L.A. 545, 15 O. Supp. 144, 62 N.E. (2d) 327, the [fol. 83] Court held that accounts receivable of the company, a Maryland corporation, which arose from sales made outside of Ohio of goods filled by shipment from its manufacturing plant in Ohio, were taxable in this State. The Court said:

'We direct our attention first to the question whether the accounts receivable, arising from sales outside Ohio and filled from a stock of goods in Ohio, have an Ohio situs for purpose of taxation.'

In referring to section 5328-2, General Code, the Court said:

'Applying that section to the facts in the instant case, it means that accounts receivable belonging to a Maryland corporation, when resulting from sales of property by an agent having an office in Ohio or from a stock of goods maintained in Ohio, shall be considered to arise out of business transacted in Ohio.'

It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The Board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of National Distillers Products Corporation v. Glander, No. 11118, decided by this Board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the Board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

For the foregoing reasons the Board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this State and, consequently, are taxable here.

No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this State. [fol. 84] As to this, section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The Board finds that these prepaid items relate to property used in appellant's business in this State and, in view of the above statu-

tory provisions, arose out of business transacted in this State and are, therefore, taxable.

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

(S.) Edward J. Kirwin, Secretary." (Seal.)

The decision is erroneous in the following respects:

1. It affirms the action of appellee in assessing an ad valorem tax in respect of intangible property of appellant, a foreign corporation not having a commercial domicile in Ohio, notwithstanding that the property, consisting of accounts receivable and prepaid items, was never in Ohio and did not have a business situs in Ohio. The assessment, therefore, is invalid and collection of the tax assessed would (a) burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and (b) deprive appellant of its property without due process of law and deny appellant the equal protection of the laws, [fol. 85] contrary to the 14th Amendment to the Constitution of the United States.

2. It construes Section 5328-1 and 5328-2 of the General Code of Ohio, as applied to the stipulated facts of this case, to require the assessment of appellant's aforesaid property for taxation in Ohio. As so construed and applied, said statutes are unconstitutional because (a) they burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and (b) deprive appellant of its property without due process of law and deny appellant the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States.

3. The intangible property of appellant is not taxable in Ohio under Ohio law, because it did not have a business

situs in Ohio and did not arise out of and was not used in business in this state.

4. There is no evidence in the record to support the Board of Tax 'Appeals' decision that appellant's accounts receivable resulted from sales of property from a stock of goods maintained in Ohio.

Wheeling Steel Corporation, by (S.) Dargusch,
Caren, Greek & King, Its Attorneys.

[fol. 86]

IN SUPREME COURT OF OHIO

National Distillers Products Corp., Appellant, v. Glander,
Tax Commr., Appellee.

National Distillers Products Corp., Appellant, v. Evatt,
Tax Commr., Appellee.

Wheeling Steel Corp., Appellant, v. Glander, Tax Commr.,
Appellee.

United States Gypsum Co., Appellant, v. Evatt, Tax
Commr., Appellee. (Two Cases.)

Taxation—Corporation franchise and intangible personal property—Foreign corporation maintained Ohio plants which completed orders sold—General books kept and orders accepted at principal office outside Ohio—Accounts receivable or avails thereof used in business generally—Prepaid insurance premiums on property located in Ohio—Sections 5325-1, 5328-1 and 5328-2, General Code.

(Nos. 31037, 31038, 31079, 31080, and 31081—Decided August 4, 1948.)

Appeals from the Board of Tax Appeals

Five cases are here involved.

Each appellant is a foreign corporation which operates at least one manufacturing plant in the state of Ohio. Of the five appeals two have been perfected by the National Distillers Products Corporation, a Virginia Corporation, one by the Wheeling Steel Corporation, a Delaware corporation, and two by the United States Gypsum Company, an Illinois corporation.

[fol. 87]. In each case the Tax Commissioner of Ohio made an additional assessment of either intangible personal property tax or corporation franchise tax.

In each instance the order was appealed to the Board of Tax Appeals and was affirmed.

The cases are in this court for review on the contention of the appellant corporations that the decisions of the Board of Tax Appeals are unreasonable and unlawful.

OPINION *Per Curiam*

Mr. Isadore Topper; for appellant National Distillers Products Corporation.

Messrs. Dargusch, Caren, Greek & King, for appellant Wheeling Steel Corporation.

Messrs. Scott, MacLeish & Falk, Mr. Clarence D. Laylin, Mr. Charles M. Price, Mr. Clifford C. Pratt and Mr. Joseph A. Dubbs, for appellant United States Gypsum Company.

Mr. Hugh S. Jenkins, attorney general, and Mr. Daronne R. Tate, for appellee.

By the Court. These cases were presented together for the reason that all five of them involve similar questions of situs under the provision of Sections 5328-1 and 5328-2, General Code.

These and cognate provisions have been discussed and applied in many recent decisions by this court. *Aluminum Co. of America v. Evatt, Tax Commr.*, 140 Ohio St., 385, 45 N. E. (2d), 118; *Procter & Gamble Co. v. Evatt, Tax Commr.*, 142 Ohio St., 369, 52 N. E. (2d) 517; *Ransom & Randolph Co. v. Evatt, Tax Commr.*, 142 Ohio St., 398, 52 N. E. (2d), 738; *Haverfield Co. v. Evatt, Tax Commr.*, 143 [fol. 88] Ohio St., 58, 54 N. E. (2d), 149; *C. F. Kettering, Inc., v. Evatt, Tax Commr.*, 144 Ohio St., 419, 59 N. E. (2d), 370; *National Cash Register Co. v. Evatt, Tax Commr.*, 145 Ohio St., 597, 62 N. E. (2d), 327; *American Rolling Mill Co. v. Evatt, Tax Commr.*, 147 Ohio St., 207, 70 N. E. (2d), 651.

Section 5325-1, General Code, reads as follows:

“Within the meaning of the term ‘used in business,’ occurring in this title, personal property shall be considered to be ‘used’ when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchan-

dise or agricultural products belonging to a nonresident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code, reads in part as follows:

"* * * Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code * * * shall be subject to taxation * * *"

[fol. 89] Section 5328-2, General Code, contains the following provisions:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state. * * *

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this

state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a nonresident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The facts relating to two of the companies here involved are not in dispute and are supplied by stipulations. The two concerning the National Distillers Products Corporation are ten and nine pages respectively in length and need [fol. 90] not be quoted in full for the purposes of this discussion. As above indicated, this company is a Virginia corporation. Its shareholders' meetings are held in that state. Its principal business office is located in the city of New York where the meetings of its directors are held and where all its business activities are controlled. All its accounts payable are paid from funds on deposit there. It has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton county, Ohio. It sells its products in every state where such products may be sold legally. Pay-roll checks for employees of these several plants and checks for federal excise taxes due from these plants are paid with funds on deposit in banks in those localities. The funds are obtained through checks drawn at the New York office on banks in that city. All accounts receivable are posted in the books of the company in the New York office where the accounts are payable. All the receipts are deposited in New York banks. The accounts receivable, the allocation of which resulted in the additional assessments of intangible property tax and corporation franchise tax, arose from the sale of products manufactured by the company at its Carthage plant. The products were shipped from a stock of goods maintained by the company at that plant to points in Ohio and other states. All orders for the sale of these products were solicited by agents outside of Ohio. The orders were forwarded to New York [fol. 91] and were subject to acceptance or rejection at the

New York office. When orders were accepted, shipping instructions were forwarded to the Ohio plant from which the products were then shipped to the designated points in Ohio and elsewhere. The moneys received from the accounts receivable were used by the company in its business generally wherever needed. In filing its annual report and tax return the company allocated none of its accounts receivable to Ohio.

In its opinion the Board of Tax Appeals correctly summarized the matters as follows:

“The appellant, as a corporation organized and existing under the laws of the state of Virginia, is a legal resident of that state; and as to the appellant corporation the state of Ohio is ‘a state other than that in which the owner thereof resides’ and such other state within the provisions of Section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this board hereby finds—in the conduct of its business in the state of Ohio by the sale of its products from a stock of goods located in this state, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this state or elsewhere, such accounts receivable have a business and taxable situs in the state of Ohio, as found and determined by the Tax Commissioner.”

The company contends further that this interpretation of Section 5328-2, General Code, renders these provisions violative of the due-process and equal-protection clauses of [fol. 92] the state and federal constitutions. However, this question was squarely and properly decided in the recent case of *Parke, Davis & Co. v. City of Atlanta*, 200 Ga., 296, 36 S. E. (2d); 773, 163 A. L. R., 976, in which the first and fourth paragraphs of the syllabus read as follows:

“1. Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the state,

which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the city of Atlanta, and would have a taxable situs for *ad valorem* taxation by said municipality, notwithstanding that the orders taken by the nonresident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the city of Atlanta and the state of Georgia. * * *

“4. Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment to the Constitution of the United States, or paragraphs 2 and 3 of Section 1 in Article I of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the state.”

The facts concerning the Wheeling Steel Corporation are embodied likewise in a stipulation. As already stated, it is a Delaware corporation and maintains an office in that state. However, Wheeling, West Virginia, is the location [fol. 93] of its principal office and place of business where all meetings of the shareholders, directors and executive committee are held. Its general books and accounting records are kept there. All credit is determined there; and the collections of notes and accounts receivable are made there. Four manufacturing plants are operated in West Virginia and four in Ohio. Sales offices are maintained in twelve states—one in Ohio. When notes and accounts receivable are paid, the avails thereof are applied indiscriminately to the general purposes of the company's business, whether in Ohio or elsewhere. Pay rolls are prepared and pay-roll checks are prepared, signed and distributed at each plant. Bank balances sufficient for this purpose are maintained in each such community.

In its opinion the Board of Tax Appeals said in part:

"It is clear that under this statute (Section 5328-1, General Code) intangibles owned by a nonresident cannot be taxed unless they are both used in business in this state and arise out of business transacted here.
* * *

"Since the avails of these accounts *re-receivable* were applied to the conduct of appellant's business generally, both in this state and elsewhere, they must be held to be used in business within the meaning of this statute (Section 5325-1, General Code). * * *

"It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained [fol. 94] in Ohio since it is its claim that none of its accounts receivable is taxable here. The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118, decided by this board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state, and consequently are taxable here.

"No argument is made in any of the briefs with reference to the prepaid items, which consisted of pre-

paid insurance premiums on property located in this state. As to this, Section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The board finds that these prepaid items relate to property used in appellant's business in this state and, in view of the above statutory provisions arose out of business transacted in this state and are, therefore, taxable."

[fol. 95] The facts concerning the United States Gypsum Company are presented by a stipulation of facts and the testimony of two witnesses.

This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All payroll checks are prepared and signed there and are drawn on funds there and in Ohio. Sales are managed and directed through divisional and district sales offices. Two district offices are located in Ohio. Orders taken by salesmen are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States; and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere.

[fol. 96] In its opinion the Board of Tax Appeals reached the following conclusion:

"The evidence shows that certain manufacturing or processing of the raw products, which were kept on hand at its Ohio plants in sufficient quantities to fill any orders that may be received, was necessary to convert them into the completed products ordered. This process took anywhere from approximately four minutes to less than one hour. The board is of the opinion that it makes no difference whether the products were put into their completed form before or after the orders therefor were accepted and received. The evidence shows that the appellant did maintain in Ohio a stock of goods which was necessary to make the completed products sold by it. The same questions arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118 decided by this board on March 12, 1947, and the case of *Wheeling Steel Corporation v. Glander*, No. 9681 decided by this board April 7, 1947. Reference is hereby made to the entries in those cases and also to the case of *National Distillers Products Corporation v. Glander*, No. 9095 with reference to a franchise tax assessment decided on March 12, 1947.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio."

The company insists that there is a total lack of integration of the accounts receivable with that part of the company's total business which is conducted in Ohio. This court finds that it cannot agree with this contention. In this and the other cases the decisions of the Board of Tax Appeals must be affirmed.

Decisions affirmed.

Weygandt, C. J.; Turner, Matthias, Hart, Zimmerman, Sohngen and Stewart, JJ., concur.

[fol. 97] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 98] [File endorsement omitted]

IN SUPREME COURT OF OHIO

[Title omitted]

CERTIFICATE AS TO FEDERAL QUESTION INVOLVED—Filed
November 2, 1948

On motion of appellant, Wheeling Steel Corporation, the Court orders it to be certified and made a part of the record of the proceedings and of the judgment of affirmance in this cause that in its Notice of Appeal to this Court from the Board of Tax Appeals, appellant drew in question the validity of Sections 5328-1 and 5328-2 of the General Code of Ohio upon the ground that, as construed and applied by the Tax Commissioner and the Board of Tax Appeals of Ohio, said statutes are unconstitutional in this, that they burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and deprive appellant of its property without due process of law, and deny appellant equal protection of the laws of the state of Ohio, contrary to the Fourteenth Amendment to the Constitution of the United States; and that the question of the validity of said statutes, as specified in said notice of appeal, was urged upon the Court in the briefs and arguments of counsel for [fol. 99] appellant; that a determination of the question was necessary to the decision of this case; and further, that upon consideration of the same, the Court was of the opinion, and so decided, that said statutes are valid and are not repugnant to the Constitution of the United States.

Witness the Honorable the Supreme Court of Ohio this 1 day of November, 1948.

Supreme Court of Ohio, Carl V. Weygandt, Chief
Justice of the Supreme Court of Ohio.

[fol. 100]

[File endorsement omitted]

IN SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed August 17, 1948

On August 4, 1948 this court decided this cause by affirming the decision of the Board of Tax Appeals. The result of the decision is to assign an Ohio situs to certain intangible property of this appellant, Wheeling Steel Corporation, a foreign corporation, said intangible property consisting of certain prepaid insurance premiums on Ohio plants of this appellant and certain notes and accounts receivable due this appellant and to levy upon such prepaid items and such notes and accounts receivable as credits * an ad valorem tax.

[fol. 101] Wheeling Steel Corporation, the appellant herein, hereby respectfully applies for rehearing in this cause for the reasons hereinafter stated:

I

The opinion was per curiam and consists almost entirely of quotations from the opinion of the Board of Tax Appeals. Under Sections 5325-1, 5328-1 and 5328-2 of the General Code such prepaid insurance premiums and such notes and accounts receivable of this appellant, to have a taxable situs in Ohio, *must be used in business and must arise out of business in Ohio.*

(a) Under the applicable provisions of Section 5328-2 of the General Code prepaid insurance premiums (prepaid items) are said to arise out of business "when the right

* Section 5327 of the General Code defines "credits" as follows: "The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items (used) in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. 'Current accounts' includes items receivable or payable on demand or within one year from the date of inception, however, evidenced."

acquired thereby relates *exclusively* to the business transacted in such other state or to property used in such business." It is stipulated (see Stipulation of Facts, Sec. 17, page 14, Appellant's Brief) that the insurance policies, upon which the premiums were prepaid, were blanket policies covering properties and potential risks in West Virginia, Ohio and other states. It necessarily follows, therefore, that being blanket policies covering properties in several states, the right acquired thereby did not relate *exclusively* to business to be transacted in Ohio or to property used in such business and, therefore, these items did not arise out of business transacted in this state. Neither were they used in business in Ohio because they were not being [Vol. 102] applied in the conduct of business in Ohio.

(b) Under the applicable provision of Section 5328-2 of the General Code, notes and accounts receivable are said to arise out of business in Ohio if such intangibles result from sales "from a stock of goods maintained" in Ohio. The Board of Tax Appeals (see page 236 of the opinion of this court) said:

"The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant maintained in Ohio a stock of goods which was necessary to make the completed products."

This statement, which this court adopted, is erroneous and at variance with the facts of record (see Stipulation of Facts, Sec. 11, page 12 of Appellant's Brief) wherein it is stated:

"Products shipped from appellant's Ohio manufacturing plants to fill the orders from which resulted the greater part, in dollar value, of the notes and accounts receivable owned by appellant and its subsidiaries on tax-listing day in 1942 were manufactured at said plants after receipt of, and to fill specific orders therefor and had not been manufactured prior to the receipt of orders and kept on hand to fill orders. A smaller part, in dollar value, of said notes and accounts receivable resulted from sales of products which had been manufactured prior to the receipt of orders therefor and kept on hand at said plants to fill any orders therefor that appellant might receive."

It is therefore apparent that with respect to a majority of such notes and accounts receivable there was no stock of goods from which orders were filled and that goods were in fact manufactured to fill specific orders and the majority of the orders were therefore not filled from a stock of goods [fol. 103] as stated by the Board of Tax Appeals. Furthermore, there is no showing that such notes and accounts receivable were used in business within the meaning of Section 5328-1 of the General Code.

(c) This court has failed to distinguish between ad valorem taxes such as those levied by Section 5328-1 and 5328-2 of the General Code on such notes and accounts receivable and franchise or excise taxes and income taxes measured by business done. The state of Ohio has no jurisdiction to tax the credits resulting from such notes and accounts receivable of appellant merely because such notes and accounts receivable arise from the sale of tangible personal property manufactured within the state of Ohio. We may concede for the purpose of argument that the following items are illustrative of the type of property currently taxed in Ohio and properly within the territorial jurisdiction of the state of Ohio for tax purposes so far as Wheeling Steel Corporation is concerned:

1. The land and buildings of the corporation located within Ohio;
2. The machinery and equipment located therein;
3. The inventories of raw materials, semi-finished and finished products in Ohio;
4. Cash on hand in offices of the corporation located within Ohio;
5. Deposits in Ohio banks (other than general reserves) withdrawable in the course of the corporation's business by an officer or agent having an office within Ohio.

[fol. 104] It is perfectly appropriate also for the General Assembly, as it has done, to levy a franchise tax upon the capital stock of the corporation for the privilege of doing business in Ohio, allocating to Ohio that proportion of the total value of the capital stock as is represented by business done in Ohio and property in Ohio to all business and property, but by no stretch of the imagination can the General Assembly or the State Department of Taxation allocate to

Ohio for property tax purposes that which is not within the territorial jurisdiction of the State, namely:

(1) Such notes and accounts receivable which were created, maintained and controlled entirely without the state of Ohio;

(2) Such prepaid insurance premiums on blanket insurance policies covering properties in West Virginia, Ohio and elsewhere, which insurance policies were delivered, paid for and kept in West Virginia.

Both the Tax Commissioner (see page 3 of the record) and the Board of Tax Appeals (see page 13 of the record) held that they were without authority to declare the applicable statutes (Sections 5325-1, 5328-1 and 5328-2 of the General Code) unconstitutional, thereby intimating considerable doubt as to validity of the statutes in question. While the court adopted the decision of the Board of Tax Appeals and sustained the assessment, this court did not weigh the board's doubt as to the constitutionality of the statutes. If this court is going to accept the decision of the board concerning taxable situs it should also follow the board's doubts as to constitutional validity. If this court disregards the board's doubts as to the constitutionality of the statutes in question, it should at least reexamine the facts and construe the statutes so as to eliminate any question of unconstitutional application. It is the responsibility of this court to hold these sections unconstitutional if they be found to offend any provision of the Constitution of Ohio or of the Constitution of the United States. It is also the duty of this court to construe a statute if possible in a manner so as to give it constitutional operation. (*Winslow Spacarb, Inc., Appellant, v. Evatt, Tax Commr., Appellee*, 144 Ohio St. 471). This court, in order to give the statutes in question a valid construction should, therefore, rule that such prepaid insurance premiums and such notes and accounts receivable of the Wheeling Steel Corporation did not arise out of business in Ohio and are therefore not subject to taxation in this state.

Such prepaid insurance premiums and such notes and accounts receivable have been subjected to an ad valorem tax in West Virginia (see *Stipulation of Facts*, Sec. 18, page 14, Appellant's Brief) under the authority of *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, wherein it was held that accounts receivable and other intangible property of said corporation

had a business situs in West Virginia. In *Ransom & Randolph Co. v. Evatt*, 142 Ohio St. 398 this court, commenting on the reciprocal provisions of Section 5328-2 of the General [fol. 106] Code, said at page 409:

"It is clear that it was the intention of the General Assembly that all property having a business situs in Ohio should be taxed in Ohio and that no property having a business situs outside of Ohio should be so taxed."

II

Sections 5325-1, 5328-1 and 5328-2 of the General Code as applied and construed by this court are in violation of Article I, Section 8 of the Constitution of the United States for the identical prepaid insurance premiums and notes and accounts receivable of Wheeling Steel Corporation held by this court to have a taxable situs in Ohio are subject to multiple taxation so as to hinder and obstruct interstate commerce for the following reasons:

(a) Said prepaid insurance premiums and said notes and accounts receivable as intangible property may be subjected to taxation under the maxim *mobilia sequuntur personam* in the state of Delaware where the Wheeling Steel Corporation is incorporated and has its domicile. (*Newark Fire Insurance Co. v. Board of Tax Appeals*, 307 U. S. 313; *Greenhough v. Tax Assessors*, 331 U. S. 486.

(b) Said prepaid insurance premiums and said notes and accounts receivable are subject to taxation in West Virginia where the corporation has a commercial domicile and at which place said intangibles have become integral parts of [fol. 107] a local business in West Virginia so as to have a business situs there. In the Stipulation of Facts (See Sec. 18, page 14 of Appellant's Brief) it is stated as follows:

"All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942."

(See *Wheeling Steel Corp. v. Fox*, 298 U. S. 193)

(c) Said notes and accounts receivable under the theory of this court may be subject to property taxation also in the states in which the company's sales offices are located,

twelve out of thirteen of such offices being located in states other than Ohio.

(d) Said prepaid insurance premiums under the theory of this court may be subjected to property taxation also in the other states in which the corporation has property and which property is covered by the blanket policies of insurance for which such prepaid insurance premiums were paid.

III

Sections 5325-1, 5328-1 and 5328-2 of the General Code as applied and construed by this court are in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Section 2 of Article I of the Constitution of Ohio for they deny appellant, [fol. 108] Wheeling Steel Corporation, the equal protection of the laws for the following reasons:

(a) The credits resulting from such notes and accounts receivable of this appellant are subjected to an ad valorem tax in Ohio, whereas like notes and accounts receivable of a domestic corporation resulting from the sale of goods manufactured in Ohio and sold by an agent having an office in another state would be exempt under Section 5328-2. (Ransom & Randolph Co. v. Evatt, 142 Ohio St. 398; Haverfield Co. v. Evatt, 143 Ohio St. 58).

(b) It is stipulated that the proceeds of such notes and accounts receivable (see Secs. 13 and 14, pages 13 and 14, Stipulation of Facts, Appellant's Brief) were under the control of the treasurer of the corporation at Wheeling, West Virginia and were applied indiscriminately to the general purposes of appellant's business whether in Ohio or elsewhere and, therefore, if appellant were an Ohio corporation its notes and accounts receivable would have been assigned a taxable situs in a state other than Ohio under Sections 5328-1 and 5328-2 of the General Code.

Thus, notes and accounts receivable arising under circumstances identical to those in the instant case are taxable in Ohio under the decisions of this court if owned by [fol. 109] a non-resident, but are exempt from taxation in this state if owned by a resident.

IV

Sections 5325-1, 5328-1 and 5328-2 of the General Code as applied and construed by this court are in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States for the reason that this court has subjected the credits resulting from such pre-paid insurance premiums and such notes and accounts receivable of this appellant to an ad valorem tax in Ohio when said intangibles have not become integral parts of a local business in Ohio, so as to acquire a business situs in this state, are not within the territorial jurisdiction of this state and no benefit or protection has been accorded such notes and accounts receivable by this state nor to the corporation with respect thereto. *Wheeling Steel Corp. v. Fox*, 298 U. S. 193; *Tax Commission v. Aldrich*, 316 U. S. 174; *Greenhough v. Tax Assessors*, 331 U. S. 486.

Respectfully submitted, (S.) Carlton S. Dargusch,
John Caren, Dargusch, Caren, Greek & King,
44 E. Broad St. Columbus 15, Ohio, Attorneys
for Appellant.

[fol. 110] BEFORE THE BOARD OF TAX APPEALS DEPARTMENT
OF TAXATION OF OHIO

No. 9681

WHEELING STEEL CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

SECRETARY'S CERTIFICATE

I hereby certify the attached to be a true and correct transcript of the record of the proceedings of the Board of Tax Appeals of the Department of Taxation of Ohio pertaining to the decision complained of and all the evidence offered to and considered by the Board of Tax Appeals in making such decision.

(S.) Edward J. Kirwin, Secretary. (Seal.)

[fol. 111] BEFORE BOARD OF TAX APPEALS OF OHIO

ABSTRACT OF DOCKET

Appellant: Wheeling Steel Corporation No. 9681.

Appellee: C. Emory Glander, Tax Commissioner of Ohio.

Attorneys: Messrs. Dargusch, Garen, Greek and King, Columbus, Ohio, on behalf of the appellant.

Hon. Hugh S. Jenkins, Attorney General of Ohio, and Mr. Daronne R. Tate, Assistant Attorney General, on behalf of the appellee.

Filed: January 22, 1945.

Nature of appeal: Assessment against taxable credits.

Date of Hearing: September 13, 1945. Stipulation—September 27, 1945.

Journal Entry: April 7, 1947.

Appealed to Supreme Court: May 2, 1947.

[fol. 112] DEPARTMENT OF TAXATION, BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF APPEAL—Filed January 22, 1945

Appellant, Wheeling Steel Corporation, a Delaware corporation having its principal office at 1134 Market Street, Wheeling, West Virginia, hereby gives notice of appeal from the determination, finding or order of the Tax Commissioner, made under date of December 26, 1944 and bearing No. 544 on the records of such commissioner, to the Board of Tax Appeals. The following is a true copy of such determination, finding or order:

“DEPARTMENT OF TAXATION OF OHIO

Dec. 26, 1944.

No. 544

In the matter of the Application of THE WHEELING STEEL CORPORATION, WHEELING, WEST VIRGINIA, (Inter-county), for Review and Redetermination for the year 1942

The application of The Wheeling Steel Corporation, Wheeling, West Virginia, (Inter-County), for review [fol. 113] and redetermination of an additional tangi-

ble personal property tax assessment against such applicant for the year 1942, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that the application here under consideration is with respect to the denial by this department of a fair value claim covering average inventory values and which claim was filed with and at the time of the tax return for the year 1942.

The Tax Commissioner, being further advised in the premises, finds that the action as heretofore taken denying such fair value claim was in every respect proper and further finds that the average values as returned for inventories located in New Boston and Steubenville taxing districts were deficient in the amounts of \$111,010.00 and \$437,900.00, respectively, and further finds that the values as originally returned for 'machinery and equipment' in the 1942 tax return, which was located in New Boston, Steubenville, Yorkville and Martins Ferry taxing districts, were deficient in the amounts of \$1,447,320.00, \$1,114,980.00, \$2,352,310.00 and \$26,250.00, respectively.

At the time of said hearing, it was discovered that this department had failed to assess taxable credits for the tax year 1942 in the amount of \$2,093,450.00, and as to such proposed action, the applicant contested the validity of same with respect to allocating to Ohio certain of its accounts receivable on the grounds that the provisions of Section 5328-2, General Code, are not applicable and that the construction of Section 5328-1 and Section 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the Fourteenth amendment to the Constitution of the United States and the Constitution of the State of Ohio for as construed, such sections operate to tax intangible property of a non-resident over which Ohio has no jurisdiction and which has no business situs in Ohio.

As to such contention the Tax Commissioner holds that he is without authority to set aside acts of the Legislature on constitutional grounds, and further, it is the position of the Tax Commissioner that the assessment as herein ordered is in every respect proper in view of the decision of the Ohio Supreme Court in the case of Ransom & Randolph vs. Evatt, 142 O. S. 398,

[fol. 114] and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code.

In addition to the foregoing contentions, the applicant at the time of such hearing also raised the issue that the proposed action with respect to assessing net taxable credits was illegal and improper in that the accounts receivable which this department allocated to Ohio in computing net taxable credits, did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the Tax Commissioner that the receivables as allocated to Ohio in the computation of credits did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.

It is, therefore, ordered that corrected assessment certificates issue in conformity with the foregoing, which shall be final with respect to all taxable property as originally assessed and as herein ordered to be assessed.

Department of Taxation, William S. Evatt, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner, with respect to the above matter.

William S. Evatt, Tax Commissioner."

Said determination, finding or order is erroneous in that it assesses an ad valorem property tax against intangible property which is not within the territorial jurisdiction of the State of Ohio, contrary to the law of Ohio and the Fourteenth Amendment to the Constitution of the United States.

Wheeling Steel Corporation, by (S.) Dargusch, Carren, Greek and King, Its Attorneys.

[File endorsement omitted.]

[fol. 115] BEFORE TAX COMMISSIONER OF OHIO

February 9, 1945.

Appeal No. 9681

In the Matter of Appeal before the Board of Tax Appeals
Filed by WHEELING STEEL CORPORATION 1942 Inter-County
Return

CERTIFICATE OF TAX COMMISSIONER

I hereby certify that the papers hereto attached are a complete transcript of the record of the proceedings before the Tax Commissioner of Ohio, together with all evidence, documentary and otherwise, considered by him in connection with the assessment therein described.

Department of Taxation (S.) C. Emory Glander, Tax
Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

(S.) C. Emory Glander, Tax Commissioner.

Filed Feb. 10, 1945, Board of Tax Appeals.

STATE OF OHIO

W-57

Tax Form 905 V - Prescribed by
C. Emory Glander, Tax Commissioner

No. 1206

Name Wheeling Steel Corp
 Street 1134 Market St.,
 Post Office Wheeling, W. Va.

C O P Y

**PRELIMINARY
 ASSESSMENT CERTIFICATE**
 (TAX COMMISSIONER'S COPY)

Date

19

The Tax Commissioner hereby certifies that the following is the preliminary assessment of the taxable property of the above named taxpayer chargeable on the intangible property Tax List and Duplicate of the Auditor of State for the year 1942 Dec. 26, 1944

CLASSIFIED TAX LIST				RET. FORM NO. 945			
				TOTAL	RATE	AMOUNT OF TAX	
Investments yielding income				\$	5%	\$	
Investments not yielding income					.002		
Deposits					.002		
Credits				2 093 450	.003	6 280 35	
Moneys and other Taxable Intangibles					.003		
TOTAL CLASSIFIED TAX				\$	**	\$	

Per detail - No former 1942 assessment for this Co.

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ad

(SEAL)

[Signature]
 Tax Commissioner

Recapitulation of Classified or Intangible Personal Property Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Productive Investments.....	None	5%	None
Item 2 (From Schedule 7) Unproductive Investments.....	"	2 mills	"
Item 3 (From Schedule 8) Deposits	"	2 mills	"
Item 4 (From Schedule 9) Credits <i>Pay de Int. - 12/26/41</i>	113 450	3 mills	6 95
Item 5 (From Schedule 10) Money and Other Taxable Intangibles.....	"	3 mills	"
Total Amount—Aggregate Listed Value and Classified Tax (Add above Classified amounts).....	None	.	None

OATH

(Corporate seal should be impressed
so as not to affect the legible reading
of any written words or figures.)

STATE OF ~~OHIO~~ West Virginia Ohio COUNTY, ss.:

We do solemnly swear that we are the R. D. Swinburne and the Comptroller of the above named Corporation and do further swear that the answers which we have given to the specific questions asked in the foregoing tax return, so far as within our knowledge, are true; that the list contains a full disclosure of all property required by law to be listed for taxation on behalf of said Corporation; that the amounts which we have set down therein in our itemization of taxable property are, so far as they represent facts within our knowledge, true and correct; and that, in all cases in which we have answered any such question, or given any such amount, otherwise than from our own positive knowledge, such answer or amount represents our opinion and judgment, based upon the best information available to us.

SWORN to and subscribed before me this 30th day (Sign here)

of March, 1942 Title

Malby Liston (Sign here) R. D. Swinburne
Deputy Auditor—Notary—Deputy Assessor.

Title

Was this Return prepared by persons within your own organization?..... If answer is "NO," show in space below the name and address of person or firm who prepared the return:

Name Address

C O P Y

NAME OF CORPORATION.....WHEELING STEEL CORPORATION.

[illegible]

COUNTY	Kind of Business	Name under which business conducted in each location
Belmont	Fabricating Steel	WHEELING STEEL CORP.
Cuyahoga	Ore Storage	" " "
Cuyahoga	Selling Steel Prods.	CONSOLIDATED EXPANDED METAL COS.
Franklin	" " "	WHEELING CORRUGATING CO.
Jefferson	Manf. Steel Prod.	WHEELING STEEL CORP.
Scioto	" " "	" " "

Note - We also own consigned stocks of pipe located in several other counties in Ohio. - See Form 945-C-7 for detail.

MACHINERY AND EQUIPMENT.

List here all property of the following kinds owned by the Corporation and used in business in this State on listing day: Engines, machinery, tools and implements used in (a) Agriculture, (b) Refining and Manufacturing, (c) Mining, (d) Machinery, Tools and Implements used in Laundries and Dry Cleaning Plants, (e) Stone Plants, (f) Gravel Plants. Also list here repair parts for equipment mentioned herein.

List separately property used in each Taxing District.

LISTED VALUES
Used in or held for production
(a) Agriculture
(b) Refn'g & Mfg.
(c) Mining
(d) Laundries & Dry Cleaning
(e) Towel & Linen Supply
(f) Stone Plants
(g) Gravel Plants
50% of Dep. Book Value

County	Taxing District	Description	Depreciated Book Value		Total Depreciated Book Value		(c) Supply (f) Stone Plants (g) Gravel Plants 50% of Dep. Book Value	
		WHEELING STEEL CORPORATION (PARENT)						
Belmont	Martins Ferry	Covered by formal book accounts				308410		154 200
Jefferson	Steubenville	" " " " "			4	993260	2	496 630
Jefferson	Yorkville	" " " " "			2	164440	1	082 220
Scioto	New Boston	" " " " "				511010		255 500
					7	977120	3	978 550
		WHEELING CORRUGATING COMPANY						
Franklin	Columbus	Covered by formal book account.				3590		1790
		CONSOLIDATED EXPANDED METAL COMPANIES						
Cuyahoga	Cleveland	Covered by formal book account				-0-		-0-
							3	990 340
		C O P Y						

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SCHEDULE 2 - C-3

INTER COUNTY

BALANCE SHEET

For WHEELING STEEL CORPORATION
(Name)

WHEELING, W. Va.
(Address)

INSTRUCTIONS FOR BALANCE SHEET

GENERAL INSTRUCTIONS.

A Balance Sheet (Form 911) must be filled out and filed with Form 910 by all individuals, partnerships, and associations engaged in business. This balance sheet is a confidential document which may be enclosed in a special envelope marked for the Tax Commissioner and must be filed with the County Auditor at the time of making the tax return.

Tangible personal property used in business or credits must be listed at BOOK VALUE, which is to be taken as the true value unless the assessor shall find otherwise. The tax return therefore is required to be made upon the figures of the book accounts; and, generally, the making of the tax return may best be begun by preparing the balance sheet.

BOOK VALUES REQUIRED.

The balance sheet is to be in accord with the figures as at the year end used for Federal Income Tax purposes, unless a permit has been granted by the Tax Commissioner for the use of a date different from that used on the Federal return.

The first three columns provide space for reporting divisions of the book accounts in accordance with special exemptions or differentiations of values or rates to which any business may be entitled, or to segregate classes of taxable and non-taxable property.

Separation of "Within Ohio" and "Without Ohio" of tangible personal property (other than watercraft and aircraft) depends on physical location.

In the third column are to be shown the "Within Ohio" figures as at the beginning of the current taxable year. The figures (if any) for "Without Ohio" as at the date need be set down only in total at the end for the purpose of effecting proper balance. If the business was begun during 1942 this column should contain figures as at the beginning of business.

Any taxpayer having a printed balance sheet is requested to enclose a copy as an extra with this form duly completed.

BALANCE SHEET AND SCHEDULE NUMBERS.

Each heading and line for entry of amount has a Balance Sheet Number for convenience of reference to tax return or for correspondence.

In the column headed "Schedule Number" there appears for each item either a number referring to the schedule on the tax return in which such item should be listed, or a dash to indicate that such item is ordinarily non-taxable.

In several places where the taxpayer may be obliged to write a description of assets for which no printed line is provided, the asterisk indicates that the listing is to be in the appropriate schedule.

In connection with lines 6, 38, 44, 56, 86 and 91, the taxpayer is expected to distinguish between the taxable and nontaxable amounts in accordance with the instructions relating to the tax return.

SPECIAL DETAILS.

Item 2 represents cash taxed at the source and includes deposits which may have been in state banks or building and loan associations in Ohio that were closed on November 9, 1942, arrangements having been made with these institutions to pay the proper tax. As no such arrangements have been made regarding deposits in closed National banks, a listing for line 3 must be made in Schedule 10 of the tax return.

Lines 28 and 29, which refer to work in process and finished goods of manufacturers or refiners, shall have included in their amounts the labor and factory burden properly applicable.

As to line 55, Prepaid Tangible Items, see Specific Instructions relative to Schedule 9 in Instructions Form 910-A.

On line 67 shall be entered the book value of machinery and equipment which is actually taxed with buildings as real estate. A breakdown on this account is to be furnished in Schedule D on Page 4 of this form, while an explanation of additions, deductions and depreciation is to be submitted in Schedule C on Page 4 of this form.

For line 71, Machinery and Equipment Leased or Loaned to Others, the amount should be entered in Schedule 4 of the tax return, if the maker of this return is to pay the tax.

Under the heading of Other Taxable Items on line 86 may be entered the book value of such items as molds, flasks, etc.

Under the heading of Other Non-Taxable Items on line 91 should be entered the book value of patterns, dies, jigs and drawings.

SUPPLEMENTAL INFORMATION.

Schedule A provides for the computation of credits taxable in Ohio when business localization of the accounts receivable of a resident taxpayer occurs outside of Ohio or business localization of the accounts receivable of a non-resident taxpayer occurs within Ohio. When the situs occurs wholly within Ohio, Schedule 9 of the tax return provides for the complete computation of taxable credits.

Schedule B provides for a transcript of certain nominal accounts as reported on the taxpayer's Federal Income Tax Return.

Schedule C provides for an explanation of additions, deductions and depreciations in connection with all Fixed Assets. Special attention is directed to the use of this exhibit as it applies to items on lines 67, 69 and 73 of the balance sheet.

Schedule D provides for a detailed description or breakdown of items which are combined in one account on the balance sheet, as for example, Prepaid Other Intangible Items on line 54. Complete information in this exhibit will save much correspondence later.

SCHEDULE A COMPUTATION OF CREDITS TAXABLE IN OHIO

Bal. Sheet No.	(a) Within Ohio	(b) Total
12 Current Notes Receivable.....	None	\$ 1189,060
20 Current Accounts Receivable.....	"	6,122,450
51 Prepaid Insurance	"	366,000
52 Prepaid Taxes	"	
53 Prepaid Interest	"	
54 Prepaid Other Intangibles.....	"	
Total Current Receivables.....	"	\$ 9,679,510
Percentage of (a) to (b).....	"	%
100 Current Notes Payable.....	"	\$ 4,682,280
102 Current Accounts Payable.....	"	353,560
106 Accrued Expenses, Interest.....	"	
108 Accrued Expenses, Other	"	
Total Current Payables		\$ 5,035,840
Total Credits (Receivables less Payables)		\$ 4,643,670
Credits Taxable in Ohio.....	%	
(from above)		\$ None
(Carry this amount to Schedule 9, of Tax Return.)		

Balance Sheet for Individuals, Partnerships and

FOR (Name).....

(Address).....

ITEMS		END OF TAXABLE YEAR		Beginning of Tax- able Year.	These Columns for Use of County Auditor or Tax Commissioner	
Item Number	Schedule Number	ASSETS	WITHIN OHIO AMOUNT	WITHOUT OHIO AMOUNT	Within Ohio AMOUNT	
1		CASH:—				
2		In Ohio Banks or Bldg & Loan Associations Taxed at Source.....	\$ 313,778 00		\$ 163,332 00	
3	10	In National Banks in Ohio Closed November 9, 1942.....			—0—	
4	8 or 10	On Deposit Elsewhere in Ohio.....			—0—	
5	10	On Hand or in Strong Box.....			—0—	
6	6 or 8	On Deposit Outside Ohio:— Taxable in Ohio.....		\$ 2,062,756 46		
7		Not Taxable in Ohio.....				
8		NOTES RECEIVABLE..... \$ 1,215,434.42				
9		Bad Debt Reserve (per Books)..... \$ 26,431.64				
10		Balance..... \$ 1,189,002.78				
11	9	Due Within One Year from Date of Inception.....		\$ 1,189,002 78	\$ —0—	
12	6	Due After One Year from Date of Inception: Interest Bearing (Productive).....			—0—	
13	7	Interest Bearing (Non-Productive).....			—0—	
14	10	Non-Interest Bearing.....			—0—	
15		ACCOUNTS RECEIVABLE..... \$ 8,370,595.10				
16		Bad Debt Reserve (per Books)..... \$ 248,146.11				
17		Balance..... \$ 8,122,448.99				
18	9	Due Within One Year from Date of Inception.....		\$ 8,122,448 99	\$ —0—	
19	6	Due After One Year from Date of Inception: Interest Bearing (Productive).....			—0—	
20	7	Interest Bearing (Non-Productive).....			—0—	
21	10	Non-Interest Bearing.....			—0—	
22		INVENTORIES:— MANUFACTURING OR REFINING				
23	3	Raw Materials.....	\$ 6,048,449 82	\$ 3,702,231 82	\$ 5,650,417 76	
24	3	Work in Process (Including Burden).....	1,970,735 83	1,867,810 25	2,675,135 28	
25	3	Finished Goods (County of Manufacture).....	4,701,827 90	4,945,431 35	6,686,347 39	
26	3	Stored in Other Ohio Counties.....	64,804 36		75,196 51	
27	3	Supplies used in Manufacturing.....	2,257,507 58	1,094,575 67	1,860,664 24	
28		MERCHANDISING, MINING and OTHER:				
29	3	Goods held for sale.....				
30	4	Supplies not used in Manufacturing.....				
31		Goods Consigned to Others.....	42,238 00	1,287,203 19	36,547 00	
32		Goods not subject to property tax Dues & Work Halls—tax exempt	1,565,047 51		2,179,820 48	
33		Other.....	1,630,587 90		1,429,325 40	
34		INVESTMENTS—Non-Taxable:				
35		Federal Bonds.....			—0—	
36		Ohio Subdivision Bonds Issued Prior to January 1, 1913.....			—0—	
37		Bank Stocks.....			—0—	
38		Other.....		2,879,065 55	—0—	
39		U.S. Gov. Tax anticipation notes and Treasury bills.....		12,350,000 00		
40		INVESTMENTS—Taxable:				
41	6 or 7	Public Bonds.....			—0—	
42	6 or 7	Industrial and Other Bonds.....		2 00	—0—	
43	6 or 7	Corporation Stocks.....			—0—	
44	6 or 7	Notes and Mortgages.....			—0—	
45	6 or 7	Other.....		75,510 72	—0—	
46		DEFERRED CHARGES:—				
47	9	Prepaid Insurance.....		368,006 77	—0—	
48	9	Prepaid Taxes.....		114,472 89	—0—	
49	9	Prepaid Interest.....			—0—	
50	9	Prepaid Other Intangible Items (Detail in Schedule D).....		198,345 40	—0—	
51	4	Prepaid Tangible Items (Detail in Sch. D).....			—0—	
52		Unamortized Items (Detail in Sched. D).....		1,847,431 00	—0—	
53	6	PATENTS & COPYRIGHTS—Yielding Roy- alties or Other Income during taxable year.....			—0—	
54		PATENTS & COPYRIGHTS—Not Yielding Royalties or Other Income during taxable year.....		1 00	—0—	
55		Cash deposit with Bond Trustees.....		300 00	—0—	
56		Due from Employees stock sub.....		157,283 11	—0—	
57		OTHERS.....		7,734,961 79	—0—	
58		(Describe) Inter-Co. Accts Rec.....			—0—	
59		Totals Carried Forward.....	\$ 20,394,975 70	\$ 50,802,540 24	\$ 20,756,856 06	

*List in Appropriate Schedules on Tax Return.

Partnerships and Associations in Business

Year ended _____, 19____. Indicate whether this Year End corresponds with that on your Federal Income Tax Return. ☐ Yes. ☐ No

(Month) (Day)

County Order	ITEMS		ASSETS—(Continued)	END OF TAXABLE YEAR				Beginning of Tax- able Year.		These Columns for Use of County Auditor or Tax Commissioner	
	Rel. Sec. Number	Schedule Number		WITHIN OHIO		WITHOUT OHIO		Within Ohio			
				AMOUNT		AMOUNT		AMOUNT			
	62		Totals Brought Forward	\$20,594,975	70	\$50,002,540	24	\$20,756,856	06		
	63		FIXED ASSETS:								
	64		Land								
	65		Buildings \$95,288,734.43								
	66		Depreciation (Book) 36,402,864.01	40,238,100	38	18,647,770	04	40,686,661	42		
	67		Machinery & Equipment								
			Taxed as Real Estate								
	68		Depreciation (Book)								
	69	2 or 4	Machinery & Equipment								
			Not Taxed as Real Estate \$25,043,204.06								
	70		Depreciation (Book) 16,790,173.96	7,980,713	95	272,316	15	7,804,981	21		
	71	4	Machinery & Equipment								
			Leased or Loaned to Others								
	72		Depreciation (Book)					-0-			
	73	4	Furniture and Fixtures \$763,909.87								
	74		Depreciation (Book) 399,502.12	116,455	04	287,952	71	97,376	59		
	75		Delivery Equipment:								
	76		Registered Motor Vehicles \$278,357.59								
	77		Depreciation (Book) 115,343.57	98,157	26	124,856	76	17,612	55		
	78	4	Other Vehicles								
	79		Depreciation (Book)	-0-		-0-		-0-			
	80	1	Domestic Animals								
	81		Depreciation (Book)	-0-		-0-		-0-			
	82	4	Watercraft								
	83		Depreciation (Book)	-0-		-0-		-0-			
	84	4	Aircraft								
	85		Depreciation (Book)	-0-		-0-		-0-			
	86		Other Taxable Items:								
	87										
	88		Depreciation (Book)	-0-		-0-		-0-			
	89										
	90		Depreciation (Book)	-0-		-0-		-0-			
	91		Other Non-Taxable Items:								
	92										
	93		Depreciation (Book)	-0-		-0-		-0-			
	94										
	95		Depreciation (Book)	-0-		-0-		-0-			
	96		Assets Within Ohio at Beginning of Tax- able Year	X X X	X	X X X	X	\$92,373,487	83		
	97		Assets Without Ohio at Beginning of Tax- able Year	X X X	X	X X X	X	\$60,220,566	50		
	99		TOTAL ASSETS	\$68,968,402	33	\$69,335,435	29	\$120,594,054	33		

LIABILITIES

		End of Taxable Year		Beginning of Taxable Year	
100	9	NOTES PAYABLE:—(Due within one year from date of inception)	\$1,200,000 00	\$2,000,000 00	
101	—	NOTES PAYABLE:—(Due after one year from date of inception—not deductible in Schedule 9)	4,800,000 00	-0-	
102	9	ACCOUNTS PAYABLE:—(Due within one year from date of inception)	4,689,285 79	2,829,548 18	
103	—	ACCOUNTS PAYABLE:—(Due after one year from date of inception—not deductible in Schedule 9)		-0-	
104					
105	—	BONDS AND MORTGAGES	30,000,000 00	31,500,000 00	
106	9	ACCRUED EXPENSES:—Interest	353,500 00	588,780 00	
107	—	Taxes and Assessments (not deductible in Schedule 9)	8,450,349 73	2,412,801 46	
108	9	All Other (Describe Fully)	165,570 42	120,839 38	
109	—	OTHER LIABILITIES:—(Describe fully) Reserve for Contingencies	2,017,963 99	1,366,022 49	
110		Reserve for relining furnaces, etc	555,601 76	674,847 13	
111		CAPITAL INVESTMENT	64,800,300 00	66,278,900 00	
112					
113		SURPLUS (Capital)	590,100 47	563,415 91	
114		UNDIVIDED PROFITS	20,681,086 16	18,258,599 78	
115		TOTAL LIABILITIES	\$128,293,898 23	\$129,594,054 33	

SCHEDULE B—ACCOUNTS AS REPORTED ON FEDERAL INCOME TAX RETURN.

1. State kind of business.....
2. Total receipts from business or profession for taxable year..... \$.....
3. Inventory at beginning of year.....
4. Merchandise bought for sale.....
5. Labor.....
6. Other Costs.....
7. Inventory at end of year.....
8. Bad debts charged off.....
9. Depreciation.....

SCHEDULE -C Additions, Deductions And Depreciation of Fixed Assets.
To be Answered By All Taxpayers Engaged in Business.

1. Total distributions to stockholders charged to earned surplus during the taxable year \$4,021,832.25
2. Contributions or gifts (excess over 5 percent limitation)
3. Federal income taxes 2,777,015.20
4. 5. 6. Show total per Federal
7. Replacements, renewals, and capital expenditures charged to expense on the books
8. 9. 10. Show total per Federal
11. Additions to surplus reserves (list each reserve separately):
(a) Contingencies 908,617.02
(b) Relining & Rebuilding 1,161,012.50
(c) Bad Debts 10,950.00
12. Other allowable deductions:
(a) Interest on 4 1/2 bonds 538.46
(b) Depletion adjustment 130,564.88
13. Adjustments for tax purposes not recorded on books (itemize):
(a) To adjust Federal income tax 2,768.05
(b) To adjust Capital Stock Tax 34,484.45
Unearned interest 89,469.44
14. Sundry debits to earned surplus (itemize):
(a) To adjust Capital Surplus A/C 68 42,669.11
(b) Preferred Stock
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year 20,681,086.16
16. Total of lines 1 to 15 29,861,067.52

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX
17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year 18,258,899.78
18. Adjusted net income 9,820,109.73
19. Nontaxable and partially exempt income:
(a) Interest
(b) Other nontaxable income (itemize):
(c) Taxes paid 1940 Capitalized 1,824.85
20. Charges against surplus reserves deducted from income in the return (itemize):
(a) Contingencies 436,379.81
(b) Relining & Rebuilding 1,280,257.87
(c) Bad Debts 4,743.56
21. Adjustments for tax purposes not recorded on books (itemize):
(a) 19th & 35th Bleeding Mill-Staub 58,874.92
(b)
(c)
22. Sundry credits to earned surplus (itemize)
(a)
(b)
(c)
23. Total of lines 17 to 22 29,861,067.52

*Analysis of Additions, Deductions and Adjustments—Items 3, 4, & above. The information requested in in schedule "D" is extremely voluminous and will be made available by the Corporation upon request of the Department of Taxation.

SCHEDULE D—ANALYSIS OF BALANCE SHEET ACCOUNTS.

Bal. Sheet No.	DETAILED DESCRIPTION	Bal. Sheet No.	DETAILED DESCRIPTION
	Land, Buildings & Equipment taxed as Real Estate		
62	Land Belmont County \$1,223,595		
to	Jefferson County 30,343,715		
68	Marion County 149,737		
and	Scioto 8,521,060		

State whether the Tax Return and Balance Sheet were prepared by ☒ you or ☐ an outside accountant or attorney.
If forms were prepared by an outside accountant or attorney, give name and address below:

Was an audit report the basis of the figures? ☐ Yes. ☐ No.

OATH

STATE OF OHIO West Virginia, Ohio COUNTY, ss.

R. D Swinburne being duly sworn, says that the statements in the foregoing balance sheet are true.

SWORN to and subscribed before me this 30th day of

March 1942

G. D. Swinburne
Individual Member of Partnership-Member of Association

Malby Liston
Auditor-Notary-Deputy Assessor

Corporation Return of Taxable Property for 1948 1942
Inter-County or Consolidated

IF A CONSOLIDATED RETURN IS FILED A CONSOLIDATING BALANCE SHEET, INCLUDING ALL CONTROLLED SUBSIDIARIES, IS REQUIRED.

NAME OF CORPORATION WHEELING STEEL CORPORATION

This return is made by the above named corporation as holder of fifty-one per cent or more of the common stock of the following named corporations.

N A M E	ADDRESS	State in which Organized	Date of organization	Number shares of Outstanding Common Stock	Number owned by reporting company	No. shares owned by Ohio Individuals
Wheeling Corrugating Co.	West Virginia		June 29, 1917	10,000	10,000	None
Consolidated Expanded Metals Companies	W. Virginia		June 11, 1929	500	500	None

This corporation or ~~its subsidiaries~~ one or more of its subsidiaries held at listing date personal property in the following counties in Ohio.

C O U N T Y	T A X I N G D I S T R I C T	Name under which business conducted in each location
Belmont	Fabricating Steel	WHEELING STEEL CORP
Cuyahoga	Ore Storage	" " "
Cuyahoga	Selling Steel Prods.	CONSOLIDATED EXPANDED METALS CO.
Franklin	" " "	WHEELING CORRUGATING CO.
Jefferson	Manf. Steel Prod.	WHEELING STEEL CORP.
Scioto	" " "	" " "

Note - We also own consigned stocks of pipe located in several other counties in Ohio. - See Form 945-C-7 for detail.

Recapitulation of Classified or Intangible Personal Property

Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Investments Yielding Income.....	\$ None	5%	None
Item 2 (From Schedule 7) Investments Not Yielding Income.....	"	.002	"
Item 3 (From Schedule 8) Deposits	"	.002	"
Item 4 (From Schedule 9) Credits <i>7th Street - 3rd floor 12/2-144</i>	<i>201-40</i> "	.003	<i>62.135</i> "
Item 5 (From Schedule 10) Money and Other Taxable Intangibles.....	"	.003	"
Total Amount Aggregate Listed Value and Classified Tax.....	\$ None	..	None

SCHEDULE 3. INVENTORY—MANUFACTURING—REFINING.

List here an average value of a classified inventory of all personal property owned and used by the Corporation IN THIS STATE in MANUFACTURING or REFIN-
ING, and subject to be listed on the AVERAGE VALUE basis for the year or part thereof.

(Check the respective source of figures.) ☒ Physical Inventory; ☒ Perpetual Book Inventory. ☐ Gross Profit Method. State date of last Physical Inventory;

Dec. 31, 1941

Check Method of Pricing Inventory ☒ Cost; ☐ Market.

Inventory of finished products used in manufacturing or refining NOT KEPT or STORED at the place of manufacture or in a warehouse IN THE COUNTY where manufactured or inventory held for retail sale MUST BE LISTED AS MERCHANDISE on Form No. 945 C-7.

List separately property used in each Taxing District.

[illegible]

List here an estimated average value of a classified inventory of all personal property owned and used by the Corporation IN THIS STATE as MERCHANDISE, and subject to be listed on the AVERAGE VALUE basis for the year or part thereof.

(Check the respective source of figures.) ☒ Physical Inventory; ☒ Perpetual Book Inventory. State date of last Physical Inventory: December 31st, 1941

Check the Inventory Method ☒ Cost; ☐ The Lower of Cost or Market; ☐ Other Methods, outline below _____

Inventory of finished products used in manufacturing or refining NOT KEPT or STORED at the place of manufacture or in a warehouse IN THE COUNTY where manufactured MUST BE LISTED AS MERCHANDISE.

List separately property used in each Taxing District. To list as per book account, see Form 945-C7, Page 1

County	Taxing District	January	February	March	April	May	June	July	August	September	October	November	December	Total Monthly Inventory Values	Average Monthly Inventory Value (divide by total number of months in business)	Listed Value 70% of Average Value
WHEELING CORRUGATING COMPANY																
Franklin	Columbus	68 250	77 260	85 260	71 000	72 340	67 560	55 980	77 340	52 710	48 310	32 800	38 900	748 410	62 370	43 660
CONSOLIDATED EXPANDED METAL COMPANIES																
Cuyahoga	Cleveland	24 980	27 730	30 860	29 490	30 890	32 170	31 670	21 030	19 080	21 370	25 300	25 910	320 480	26 710	18 700
CONSIGNEE PIPE STOCKS-WHEELING STEEL CORP.																
Aulaize	St. Marys	3 440	5 440	4 900	3 640	3 920	4 060	3 850	2 540	3 800	2 600	4 000	2 760	44 950	3 750	2 620
Cuyahoga	Cleveland	5 450	6 320	5 420	6 330	8 200	6 130	5 870	4 020	4 570	4 810	2 310	4 370	63 820	5 320	3 720
Franklin	Columbus	-0-	1 360	2 320	1 180	1 130	980	1 750	2 930	2 700	4210	780	2 650	21 990	1 830	1 280
Franklin	Columbus	3 590	4 610	4 170	6 230	3 850	3 280	8 690	3 820	6 990	5 020	5 820	6 450	62 510	5 210	3 650
Franklin	Columbus	3 220	3 870	3 130	3 600	2 870	2 690	2 020	3 200	3 030	2 840	2 570	1 960	34 900	2 910	2 040
Hamilton	Cincinnati	4 410	2 640	3 230	1 910	3 260	3 370	5 690	-0-	-0-	-0-	-0-	-0-	24 410	2 030	1 420
Hancock	Findlay	8 990	8 430	9 420	7 580	7 070	5 600	5 670	6 610	6 770	4 820	7 690	9 050	87 700	7 310	5 120
Montgomery	Dayton	3 490	6 240	5 910	5 500	3 430	3 840	4 760	5 410	3 340	2 360	2 060	5 850	52 190	4 350	3 040
Scioto	Portsmouth	3 140	4 330	3 740	4 020	3 950	4 600	3 060	2 840	5 090	2 170	2 860	4 540	44 340	3 690	2 580
Summit	Akron	4 230	4 740	5 080	6 960	7 890	5 460	5 960	4 630	4 530	5 060	3 350	4 290	62 080	5 170	3 620
Wood	Wayne	1 240	1 830	1 860	1 800	690	690	1 200	510	930	1 800	370	310	13 630	1 140	800
COPY																

INSTRUCTIONS—Use of Form 945 C-8.

This Form is to be used by all companies engaged in manufacturing, in listing such items as office furniture and fixtures, and by the corporations engaged in merchandising, in listing all personal property other than inventory, such as fixtures and equipment. This schedule should also be used by corporations engaged in service enterprises such as Hotel Keeping, Garages, Contracting, Restaurants, Amusements, Storage, Transportation, etc., in listing all personal property, including furniture, fixtures, tools, machinery, implements and/or such other personal property used in business. Instructions on the use of Form 945 C-7 relative to county and taxing district will also apply to this schedule.

Segregate leased machinery and/or equipment and give name and address of lessor.

List values in dollars only and make all items end in 0, viz., 100—110—120.

MACHINERY AND EQUIPMENT.

List here all property of the following kinds owned by the Corporation and used in business in this State on listing day: Engines, machinery, tools and implements used in (a) Agriculture, (b) Refining and Manufacturing, (c) Mining, (d) Laundries and Dry Cleaning Plants, (e) Towel and Linen Supply Plants, (f) Stone and Gravel Plants. Also list here repair parts for equipment mentioned herein. If value of equipment below is based on "True Value" computation, attach detail "Description of Business", page B, must justify manufacturing classification.

List separately property used in each Taxing District.

County	Taxing District	Description	Depreciated Book Value			Total Depreciated Book Value		
WHEELING STEEL CORPORATION (PARENT)								
Belmont	Martins Ferry	Covered by formal book accounts					308410	154200
Jefferson	Steubenville	" " " " "				4	993260	2496630
Jefferson	Yorkville	" " " " "				2	164440	1082220
Scioto	New Boston	" " " " "					511010	255500
						7	977120	3988550
WHEELING CORRUGATING COMPANY								
Franklin	Columbus	Covered by formal book account.					3590	1790
CONSOLIDATED EXPANDED METAL COMPANIES								
Cuyahoga	Cleveland	Covered by formal book account.					-0-	-0-
								3990340
CCPY								

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SCHEDULE 2

Form No. 945

OATH

SECTION 5522 G. C.

The State of West Virginia, County of Ohio, ss.:

R. D. Swinburne being duly sworn, deposes and says that he is

the Comptroller of The above named Company that he executed the foregoing report in the name of and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make said statement, and to execute the same, by authority of the corporation and further, such corporation has not during the preceding year, directly or indirectly paid, used or offered, consented or agreed to pay or use, any of its money or property for, or in aid of, any political party, committee or organization, or for, or in aid of, any candidate for political office, or for nomination for any such office, or in any manner used any of its moneys or property for any political purpose whatsoever or for the reimbursement or indemnification of any person or persons for moneys or property so used, and that he is an officer of said corporation, having knowledge of the facts herein set forth, and that the statements contained in said report and in this affidavit are true.

R. D. Swinburne

Sworn to before me, and subscribed in my presence, this 30th day of March, A. D., 1942

Malby Liston

Notary Public

C O P Y

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RECAPITULATION OF LISTED VALUES OF TANGIBLE PERSONAL PROPERTY

[illegible]

RECAPITULATION

Form No. 945-D

C O P Y

What tangible personal property not owned by the Corporation and not shown on its balance sheet did it hold as LESSOR, on CONDITIONAL SALE CONTRACT or under SIMILAR AGREEMENT on the day as of which the Corporation has listed its own property?	Name of Owner	Address of Owner	Description	County where located	Value
	Telautograph Corp	16 W. 61st Street N Y N Y	Telautograph Jefferson Equipment		
	International Business Machine Corp	World Headquarters Bldg, N.Y. N. Y.	Tabulating Equipment	Scioto	
	Note - See copies of letters written by above named owners filed with the Dept. of Taxation's copy of our 1935 return				

CHANGES IN VALUATION OF REAL ESTATE OWNED OR OCCUPIED

NEW BUILDINGS, STRUCTURES OR IMPROVEMENTS MADE OR
ERECTED OR MINERAL DEPOSITS DEVELOPED SINCE APRIL 12,
1942.BUILDINGS, STRUCTURES OR IMPROVEMENTS DESTROYED, IN-
JURED OR REMOVED WHOLLY OR IN PART SINCE OCTOBER 1,
1942 AND NOT RESTORED OR TO BE RESTORED PRIOR TO APRIL
11, 1943, OR THE EXHAUSTION OR ABANDONMENT OF MINERAL
DEPOSITS WITHIN THE PAST YEAR.Addition to Lithographing Building
Kind of building, structure improvement or mineral development

None

Kind of building, structure, improvement or mineral depletion or abandonment

at our Yorkville Works \$175,000
Increase in value

Decrease in value

Yorkville, Ohio
On what lot or lands situated

On what lot or lands situated

Yorkville Jefferson County
Taxing District County, Township or Municipality

Taxing District County, Township or Municipality

REPORT AS TO OWNERSHIP, YIELDS AND VALUES OF STOCK

Tax form No. 930 filed January 14, 1942

and tax forms No. 930 filed January 14, 1942

	Par Value	Dividend per share in 1942	Market quotation	Number of Ohio Stockholders Corporations omitted
Common Stock	No par	\$2.00	25-1/4	835
Preferred Stock \$5. Cumulative				
convertible Prior preferred	No par	\$5.00	63	415

IF THE CORPORATION ACTED IN ANY FIDUCIARY CAPACITY FOR A NON-RESIDENT OF OHIO OR FOR A CORPORATION NOT AD-
MITTED TO DO BUSINESS IN OHIO THE FOLLOWING INFORMATION MUST BE SUBMITTED.

Capacity	Name of Principal	Address	Nature of Business
	N O N E		

CLAIM FOR DEDUCTION FROM BOOK VALUE-----FORM 902

C O P Y

Made by (Name) Wheeling Steel CorporationAddress Wheeling, West VirginiaDate December 31 1941

The undersigned taxpayer, having duly listed ~~book value~~ its tangible personal property used in business on County Auditor's Tax Form NO 945 as ☐ Individual, ☐ Partnership, ☒ Corporation, ☐ (Fiduciary), and with it transmitted a balance sheet or financial statement of the business on Form NO 911, hereby makes claim for the assessment of such property, or portions thereof as herein stated, on basis of its true value, instead of the book value, less book depreciation, as duly listed in the tax return.

(Omit cents in setting down amounts.)

TAXING DISTRICT (Fill in name)	TANGIBLE PROPERTY	Domestic Animals & Products	Engines, Mach. Tools & Implements	Manufactur- ing & Merchandise Inventory	Personal Property Used in Business	Aircraft & Air- craft Equipment	TOTALS
1. <u>See reverse</u>	Book Value						
<u>side of sheet</u>	Deduction Claimed						
2. <u>for detail</u>	Book Value						
	Deduction Claimed						
3.	Book Value						
	Deduction Claimed						
4.	Book Value						
	Deduction Claimed						
5.	Book Value						
	Deduction Claimed						
TOTALS	Book Value			15,011,780			
	Deduction Claimed			3,752,940			
	Claimed True Value			11,258,840			

Analysis of causes. This claim is based upon one or more of the following reasons as indicated by checkmark:

- (a) ☒ Inadequate depreciation or reserve has been set up on the books
(b) ☐ Property damaged or destroyed has not been written off the books.
(c) ☐ Property consumed or abandoned has not been written off the books.
(d) ☒ Other causes

Following is an explanation and comparison of book amounts and claimed true value for each item under claim, with reference to supporting data. (Note: Data must be full and complete.)

- (1) Fair value is estimated as representing 75% of book value and the reduction is claimed in order that the value of the inventories may be stated at a value approximately their true value in money.
(2) Book values include large amounts representing depreciation on plant and equipment also transportation expense which should be eliminated to arrive at true value.

TAXING DISTRICT	CREDITS	REMARKS
Current Credits Book Accounts, Notes and Other Receivables. (From Schedule 9.)	Book Value Deductions Claimed Claimed True Value	

Analysis of causes. This claim is based upon one or more of the following reasons, as indicated by checkmark:

- (a) ☐ Inadequate reserve has been set up on the books.
(b) ☐ Bad accounts have not been written off books.
(c) ☐ Other causes

Following is an explanation and comparison of book amounts and claimed true value for each item under claim, with reference to supporting data. (Note: Data must be full and complete.)

- (3) Book values are in excess of true value by reason of the location of our plants in relation to markets. Other steel companies have plants in or adjacent to the larger steel consuming centers into which we must ship our products. This forces us to absorb large freight differentials and should be recognized in arriving at true value in money.
(4) Book values are in excess of true value due to the excessive costs of raw materials and the increased labor rates effective as a result of the present war conditions. The taxpayer has not changed its method of accounting to effect the "last in-first out" method of inventory accounting recognized and permitted by the Internal Revenue Code which, if followed, would result in a considerable reduction of the book values of inventories.

Detail of claim for deduction from book value of inventories-

TAXING DISTRICT	TANGIBLE PROPERTY	MANUFACTURING & MERCHANDISING INVENTORIES FROM SCH. 945C-6 & 7
Auglaize County	Book Value	3,750
St. Marys	Deduction Claimed	940
Belmont County	Book Value	1,939,320
Martins Ferry	Deduction claimed	484,830
Cuyahoga	Book Value	168,220
Cleveland	Deduction claimed	42,050
Franklin	Book value	72,320
Columbus	Deduction claimed	18,080
Hamilton	Book Value	2,030
Cincinnati	Deduction claimed	510
Hancock	Book Value	7,310
Findlay	Deduction claimed	1,830
Jefferson	Book value	4,997,270
Steubenville	Deduction claimed	1,249,310
Jefferson	Book value	3,862,330
Yorkville	Deduction claimed	965,580
Montgomery	Book value	4,350
Layton	Deduction claimed	1,090
Scioto	Book value	3,944,880
New Boston	Deduction claimed	986,220
Scioto	Book value	3,690
Portsmouth	Deduction claimed	920
Summit	Book value	5,170
Akron	Deduction claimed	1,290
Wood	Book value	1,140
Wayne	Deduction claimed	290
	Book value	\$ 15,011,780
Totals	Deduction claimed	3,752,940
	Net	\$ 11,258,840

In the Matter of the Application of THE WHEELING STEEL CORPORATION, Wheeling, West Virginia (Inter-County), for Review and Redetermination for the Year 1942

DECISION OF TAX COMMISSIONER

The application of The Wheeling Steel Corporation, Wheeling, West Virginia (Inter-County), for review and redetermination of an additional tangible personal property tax assessment against such applicant for the year 1942, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that the application here under consideration is with respect to the denial by this department of a fair value claim covering average inventory values and which claim was filed with and at the time of the tax return for the year 1942.

The Tax Commissioner, being further advised in the premises, finds that the action as heretofore taken denying such fair value claim was in every respect proper and further finds that the average values as returned for inventories located in New Boston and Steubenville taxing districts were deficient in the amounts of \$111,010.00 and \$437,900.00, respectively, and further finds that the values as originally returned for "machinery and equipment" in the 1942 tax return, which was located in New Boston, Steubenville, Yorkville and Martins Ferry taxing districts, [fol. 138] were deficient in the amounts of \$1,447,320.00, \$1,114,980.00, \$2,352,310.00 and \$26,250.00, respectively.

At the time of said hearing, it was discovered that this department had failed to assess taxable credits for the tax year 1942 in the amount of \$2,093,450.00, and as to such proposed action, the applicant contested the validity of same with respect to allocating to Ohio certain of its accounts receivable on the grounds that the provisions of Section 5328-2, General Code, are not applicable and that the construction of Section 5328-1 and Section 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the fourteenth amendment to the Constitution of the United States and the Constitution of the State of Ohio for as con-

strued, such sections operate to tax intangible property of a non-resident over which Ohio has no jurisdiction and which has no business situs in Ohio.

As to such contention the Tax Commissioner holds that he is without authority to set aside acts of the Legislature on constitutional grounds, and further, it is the position of the Tax Commissioner that the assessment as herein ordered is in every respect proper in view of the decision of the Ohio Supreme Court in the case of Ransom & Randolph vs. Evatt, 142 O. S. 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code.

In addition to the foregoing contentions, the applicant at the time of such hearing also raised the issue that the pro-[fol. 139] posed action with respect to assessing net taxable credits was illegal and improper in that the accounts receivable which this department allocated to Ohio in computing net taxable credits, did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the Tax Commissioner that the receivables as allocated to Ohio in the computation of credits did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.

It is, therefore, ordered that corrected assessment certificates issue in conformity with the foregoing, which shall be final with respect to all taxable property as originally assessed and as herein ordered to be assessed.

Department of Taxation (Signed) William S. Evatt,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner, with respect to the above matter.

(Signed) William S. Evatt, Tax Commissioner.

[fol. 140]. BEFORE THE BOARD OF TAX APPEALS DEPARTMENT
OF TAXATION OF OHIO

Case No. 9681

WHEELING STEEL CORP., APPELLANT,

VS.

C. EMORY GLANDER, TAX COMMISSIONER, APPELLEE.

Statement of Evidence

PROCEEDINGS

Before Hon. William J. Ford and Frank F. Fleiming,
members of the Board of Tax Appeals of the State of Ohio,
Thursday morning, September 13, 1945.

Present: Mr. John Caren, on behalf of the Appellant.
Mr. Daronne Tate, Asst. Atty Gen. on behalf of the Appellee.

[fol. 141]. Thursday Morning Session

September 13, 1945.

Chairman Ford: Before the Board of Tax Appeals, Department of Taxation of Ohio. Wheeling Steel Corporation, Wheeling, West Virginia, appellant, against C. Emory Glander, Appellee, Case No. 9681.

Appeal of the appellant above named was filed herein under date of January 22, 1945, from a final order of the Tax Commissioner under date of December 26, 1944, denying an application for review and determination with respect to the previous order of the Tax Commissioner denying the claim for deduction from book value of machinery and equipment and of inventories of the appellant for the tax year 1942, in and by which order the Tax Commissioner, under date of December 26, 1944, an assessment was made against the appellant on and with respect to its notes or accounts receivable as taxable credits in the amount of \$2,093,450.00, (two million, ninety-three thousand, four hundred and fifty dollars).

By the assignment of error set out in Appellant's notice of Appeal, the only question then before the Board of Tax Appeals is that with respect to the right of the Tax Commissioner to assess an ad valorem property tax against

said credits as intangible property, which the appellant claims were without the territorial jurisdiction of the State of Ohio and which the Appellant further claims the State of Ohio had no authority to tax under the law of [fol. 142] Ohio and the 14th Amendment of the Constitution of the United States.

Pursuant to assignment this case was called for hearing before William J. Ford and Frank F. Fleming, members of the Board of Tax Appeals on September 13, 1945, at which time, by agreement of counsel on both sides the case was submitted to the Board on a stipulation of facts in the case, to be filed with the Board on or before September 24th, with the understanding that if the case was not submitted on said stipulation within such time the case should be immediately set down for hearing on the evidence of the case to be otherwise developed.

And the foregoing was all the evidence offered, introduced and admitted on behalf of the appellant on this Hearing of this matter.

[fol. 143] DEPARTMENT OF TAXATION OF OHIO BOARD OF TAX
APPEALS

[Title omitted]

STIPULATION OF FACTS

It is stipulated and agreed by and between counsel for the respective parties hereto that the statements hereinafter contained are true and may be considered as proved; subject, however, to the right of each of the parties to object to the reception in evidence of any one or more of said statements herein contained on the ground of the relevancy or the materiality thereof.

At all times mentioned herein:

1. The appellant, Wheeling Steel Corporation, was a corporation organized and existing under and by virtue of the laws of the State of Delaware. Appellant maintained an office in Delaware through the Corporation Service Company, a corporation, at which were kept a duplicate stock ledger and records of all transactions with reference to appellant's capital stock. Appellant did not have any individual office in the State of Delaware.

[fol. 144] 2. Appellant's business was the manufacture and sale of steel and steel products. Its general business offices, hereinafter referred to as the Wheeling office, were located in Wheeling, West Virginia, in a twelve-story office building owned by appellant, approximately 63% of the floor space of which was utilized by appellant for offices for its officers, executives and other employees.

3. The Chairman of the Board, President, all Vice-Presidents, Treasurer, Secretary and Comptroller of appellant had their offices at the Wheeling office. All meetings of stockholders, directors and the executive committee were held at the Wheeling office and dividends, when declared, were ordered to be paid and distributed at meetings held at the Wheeling office.

4. All of appellant's general books and general accounting records were kept at the Wheeling office. The accounting department (including therein the accounts payable, cost accounting, accounts receivable, inventory accounting, invoicing and plant and property divisions), advertising department, centralized employment department, claim department, credit and collection department, legal department (excluding the General Counsel, a firm of attorneys having offices in Wheeling but not in the office building owned by appellant), operating department (including therein the marine, labor relations and research divisions), order department, payroll salary and auditing department, purchasing department, real estate department, sales [fol. 145] department, stock transfer department, traffic department and treasury department were located at the Wheeling office.

Management and supervision of the accounting department were exercised by the Comptroller by authority of the By-laws of appellant then in full force and effect which provided, in Article V, Section 15, that "The Comptroller shall be responsible for the keeping of correct records of the business, assets, liabilities, and transactions of the Corporation and of all subsidiary corporations, and shall see that audits thereof are currently and regularly made by independent accountants."

The credit and collection department had the duty of investigating the credit of, and was responsible for terms of credit extended to, all customers, and supervised and was

responsible for the collection of all accounts receivable, notes, bills, trade acceptances, etc.

5. Custody of all money, securities, notes and valuable effects of appellant was exercised by the Treasurer.

6. Appellant operated eight manufacturing plants which were situated in the following places:

Wheeling, West Virginia; Steubenville, Ohio;
Benwood, West Virginia; Yorkville, Ohio;
Follansbee, West Virginia; Martins Ferry, Ohio;
Beech Bottom, West Virginia; Portsmouth, Ohio.

7. Appellant maintained sales offices in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San Francisco, California; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, [fol. 146] Missouri; Seattle, Washington, and New York City, at which orders for appellant's products were solicited and received subject to acceptance by the Wheeling office.

8. Appellant filed an inter-county consolidated personal property tax return for 1942 with the department of taxation. Said tax return included a consolidated balance sheet (Form 911) of appellant's and some of its wholly owned subsidiaries' assets and liabilities as of January 1, 1942, showing, among other assets, accounts and notes receivable due within one year from the date of creation, deposits in Ohio banks and prepaid insurance, of which only the item of "deposits in Ohio banks" was shown on said balance sheet as having a situs in Ohio.

9. As the result of an examination of appellant's books at the Wheeling office, appellee determined that, as of the beginning of the first day of January, 1942, appellant and all of its subsidiaries owned credits taxable in Ohio (in addition to "deposits in Ohio banks") in the amount of \$2,093,450 and, with respect to such credits, assessed against appellant a tax of \$6280.35.

10. In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of \$5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and ac-

counts receivable resulted from the sale of products shipped [fol. 147] from appellant's Ohio manufacturing plants; that \$225,328 in prepaid insurance had arisen out of business transacted in Ohio inasmuch as it represented prepaid premiums for insurance on appellant's Ohio manufacturing plants. The total of the credits so determined to have arisen out of business transacted by appellant in Ohio was \$5,475,853 and was 47.623% of all of appellant's and its subsidiaries' notes, accounts receivable and prepaid items which amounted to \$11,498,424 on tax-listing day in 1942. Appellee then computed said assessment by deducting \$7,102,340, the total of appellant's and its subsidiaries' accounts payable, from \$11,498,424, the total of the notes and accounts receivable and prepaid items, and assessing 47.623% of the remainder, to-wit, \$2,093,450, as credits taxable in Ohio. A copy of the computation made by appellee in arriving at the assessment is attached hereto, made a part hereof and marked Exhibit A.

11. Products shipped from appellant's Ohio manufacturing plants to fill the orders from which resulted the greater part, in dollar value, of the notes and accounts receivable owned by appellant and its subsidiaries on tax-listing day in 1942 were manufactured at said plants after receipt of, and to fill specific orders therefor and had not been manufactured prior to the receipt of orders and kept on hand to fill orders. A smaller part, in dollar value, of said notes and accounts receivable resulted from sales of products which had been manufactured prior to the receipt of orders [fol. 148] therefor and kept on hand at said plants to fill any orders therefor that appellant might receive.

12. Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax listing day in 1942 resulting either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. A specimen of the form of order

blank used for all sales from which the accounts receivable in question resulted is attached hereto, and made a part hereof and marked Exhibit B.

13. All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellants's business, whether in Ohio or elsewhere. The sales offices had no powers or [fol. 149] duties with respect to the creation, custody, collection or extinguishment of said notes.

14. All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avails of said accounts receivable were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of said accounts receivable were kept at the sales offices which had no powers or duties with respect to the collection thereof.

15. All of said notes and accounts receivable arose in the ordinary course of appellant's business of making sales of its products.

16. Payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants. Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose. All commercial and other accounts payable were paid by checks signed at and issued at the Wheeling office.

17. All policies of insurance against loss or liability purchased by appellant were negotiated at the Wheeling office, where they were delivered, paid for and kept. Such policies were blanket policies covering properties and potential [fol. 150] risks in West Virginia, Ohio and other states.

18. All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property

taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942.

19. The transcript of the proceedings heretofore had before the Tax Commissioner of Ohio in this matter prior to the taking of the within appeal is incorporated herein by reference and made a part hereof..

C. Emory Glander, Tax Commissioner, by Daronne R. Tate, Assistant Attorney General of Ohio.
Wheeling Steel Corporation, by Dargusch, Caren, Greek & King, Its Attorneys.

[fol. 151]

EXHIBIT "A" TO STIPULATION OF FACTS
WHEELING STEEL CORPORATION

Revised Sch. 9—per Ransom & Randolph

1942 Return	In Ohio	Out of Ohio	Total	
Accounts & Notes Receivable	5,250,525		10,817,361	
Deferred—Taxable Prepaid	225,328		449,717	
Advances—Other Cos. not controlled or consolidated			74,063	
Due—Employees Stock Subs.			157,283	
	5,475,853			11,498,424
Accounts Payable	5,205,540			
Less Tax withheld fr. employees for O.A.B.				
Unemployment	96,481		5,109,059	
Accrued Interest			353,500	
Accrued Royalties			56,046	
Reserve for Bad Debts			383,935	
*Serial Notes to Banks due 1 yr. fr. date of inception			1,200,000	
				7,102,540
Taxable Credits				4,395,884
Ohio Credits (47.623%)				2,093,452
				@ .003
Ohio Receivables Prepaid	5,475,853			6,280.35
				+ 47.623% Ohio
Total Receivables Prepaid	11,498,424			

* Date of inception 3/19/41—Payable \$100,000 per mo. \$1,200,000 at 3/19/42 first payment made.

Killam 12/14/44

(Here follow 2 Photolithographs, side folios 152, 153)

CONDITIONS OF SALE

For (a) Tubular Goods (b) Sheets and Plates (c) Tin Plate, Terne Plate and Black Plate of Tin Mill Sizes (d) Tie Plates, Sheet Bars and Skelp (e) Wire Products (f) Nails (g) Steel Barrels, Drums and Steel Range Boilers.

Orders are subject to acceptance by Seller's Home Office.

If Transportation charges or Taxes are prepaid, the total charges are to be paid by the buyer on presentation, in cash.

If a freight allowance shall be included in this quotation, and if a different rate exists at time shipment is made, then both price and allowance shall be increased or decreased by the difference between the freight allowance herein and the actual freight at time of shipment.

All payments to be made in New York exchange or its equivalent.

Any discount allowed by Seller shall apply only to the invoiced value of the products and not to any part of the transportation charges on such products.

Interest will be charged at the rate of 6% per annum from maturity of invoice until paid.

If the Buyer fails to fulfill the terms of payment under this or any other order between the Buyer and the Seller, the Seller may defer further shipments until such payments are made, or may, at its option cancel this order. The Seller reserves the right to require from the Buyer cash or satisfactory security for performance of the Buyer's obligations, and refusal to furnish such cash or security will entitle the Seller to suspend shipments until such cash or security is furnished, and, at its option, to cancel the order, reserving any and all rights to damages caused by Buyer's breach of this contract.

Railroad permits as and when required are to be obtained by buyer. Seller reserves the right of routing, unless otherwise arranged.

If the order specifies sheets and plates the standard for gauges and weights of hot rolled sheets shall be that adopted by the United States Government, July 1, 1893, for Iron (Steel is about 2% heavier than Iron.) The allowable variation for No. 17 Gauge and lighter shall be 2½% over or under, and for No. 16 Gauge and heavier, including No. 8 Gauge, 5% over or under. Plates 3/16 and heavier—the tolerances provided in Manufacturers' Standard Specifications adopted by the Association of American Steel Manufacturers shall apply.

If the order specifies tin plate, terne plate or black plate of tin mill sizes the standard for gauges and weights of hot rolled sheets shall be that adopted by the United States Government, July 1, 1893, for Iron (Steel is about 2% heavier than Iron.) The allowable variation for No. 17 Gauge and lighter shall be 2½% over or under, and No. 16 Gauge and heavier, 5% over or under.

66B

The Seller shall not be liable for non-performance, or delay in performance or for consequential damages which may arise, if such failure to perform is the result of fires, strikes, floods, differences with employees, casualties, delays in transportation, shortage of cars, embargoes, accidents, acts demands or requests of the United States Government, or other causes beyond Seller's reasonable control. Unless otherwise mutually agreed, within a reasonable time after the removal of any such contingencies, seller is to complete deliveries as rapidly as possible.

All sales are firm and not subject to cancellation or revision of prices except by and with the consent of Seller. Insistence upon cancellation or of suspension of manufacture or of shipment, or failure to furnish specifications when required, may be treated as a breach of contract, and the Buyer shall immediately be liable for all damages arising.

All inspection whether for surface, or physical, or chemical requirements when applicable, if and as agreed to at time of sale, must be made at Seller's works before shipment.

All claims for shortages and defective goods must be made within fifteen days after receipt of materials. Claims for defective materials shall, in no event, include allowance for labor on such material or consequential damages. Material must not be returned without Seller's permission. Material found defective will be replaced.

Every piece of Pipe, Tubing, Casing, Line Pipe, etc., is carefully tested but as it is impossible to always detect imperfection, the only guarantee that is given, is to replace such goods as prove defective. Under no circumstances is Seller responsible for any damages beyond the price of the goods. No charges for labor or expenses required to repair defective goods or occasioned by them will be allowed. If the goods are defective, the measure of damages is the price of the defective pieces.

The permissible variation in weight of all Tubular Goods is five per cent above and five per cent below the Seller's published weights for such goods except in the case of Double Extra Strong Pipe where the permissible variation in weight is ten per cent above and ten per cent below.

Extra Strong and Double Extra Strong Pipe are always furnished in random lengths with plain ends, unless otherwise ordered.

All other Tubular Goods are always furnished in random lengths with threads and couplings, unless otherwise ordered.

Any tax or other Governmental charge imposed by Federal, State, or Municipal Authorities upon production, sale and/or shipment of the articles covered hereby, may at Seller's option, be added to the amount to be paid hereunder.

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[fol. 154] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT
OF TAXATION OF OHIO

No. 9681

WHEELING STEEL CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee

DECISION—April 7, 1947

This cause came on for hearing upon an appeal from the final order of the Tax Commissioner denying an application for review and redetermination with respect to an assessment made by him against the appellant on its taxable credits consisting of notes or accounts receivable and prepaid items, which assessment amounted to \$6,280.35. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, the stipulation of facts and briefs of counsel.

From the stipulation of facts it appears that appellant is a Delaware corporation, in which state it maintained a statutory office. Its principal office and place of business were located in Wheeling, West Virginia, where all the officers had their offices, where all meetings of shareholders, directors and the executive committee were held and where all dividends were declared. All of appellant's general books and accounting records were kept at the Wheeling [fol. 155] office. All credit was granted and collections of accounts and notes receivable, etc. were made there. Appellant operated four manufacturing plants in West Virginia and four in Ohio. It maintained sales offices in twelve states, one of which offices was located in Cincinnati, Ohio.

The stipulation also contains the following:

"Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax listing day in 1942 resulted either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when

so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. * * *

"All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. The sales offices had no powers or duties with respect to the creation, custody, collection or extinguishment of said notes.

"All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avials of said accounts receivable were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of said accounts re-[fol. 156] ceivable were kept at the sales offices which had no powers or duties with respect to the collection thereof.

"All of said notes and accounts receivable arose in the ordinary course of appellant's business of making sales of its products.

"Payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants. Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose. All commercial and other accounts payable were paid by checks signed at and issued at the Wheeling office.

"All policies of insurance against loss or liability purchased by appellant were negotiated at the Wheeling office, where they were delivered, paid for and kept. Such policies were blanket policies covering properties and potential risks in West Virginia, Ohio and other states.

"All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942."

In its consolidated inter-county return appellant allocated all of its accounts receivable and prepaid items outside of Ohio. The tax commissioner, on the other hand, determined that certain of the credits owned by appellant and its subsidiaries had their situs in Ohio and that the amount thereof which was therefore, taxable in this state was \$2,093,450. making an assessment thereon of \$6,280.35, which is the subject of this appeal. The amount of such credits was arrived at as follows:

[fol. 157] "In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of \$5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and accounts receivable resulted from the sale of products shipped from appellant's Ohio manufacturing plants; that \$225,328 in prepaid insurance had arisen out of business transacted in Ohio inasmuch as it represented prepaid premiums for insurance on appellant's Ohio manufacturing plants. The total of the credits so determined to have arisen out of business transacted by appellant in Ohio was \$5,475,853 and was 47.623% of all of appellant's and its subsidiaries' notes, accounts receivable and prepaid items which amounted to \$11,498,424 on tax-listing day in 1942. Appellee then computed said assessment by deducting \$7,102,540, the total of appellant's and its subsidiaries' accounts payable, from \$11,498,424, the total of the notes and accounts receivable and prepaid items, and assessing 47.623% of the remainder, to-wit, \$2,093,450, as credits taxable in Ohio."

One question presented is whether the tax commissioner erred in allocating to Ohio the accounts receivable which arose from sales of goods which were shipped from its plants in this State. In determining this question the Board is bound to follow the statutes applicable thereto,

as construed by the Supreme Court. Section 5328-1, General Code, provides in part as follows:

“Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock [fol. 158] of financial institutions and dealers in intangibles located in this state shall be subject to taxation;”

It is clear that under this statute intangibles owned by a nonresident cannot be taxed unless they are both used in business in this State and arise out of business transacted here. Section 5325-1, General Code, reads in part as follows:

“Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be ‘used’ when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. ‘Business’ includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.”

Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. *Ransom & Randolph Co. v. Evatt*, 142 O. S. 398, 27 O. O. 348, 37 O. L. A. 481, 10 O. Supp. 25, 52 N. E. (2d) 738; *Haverfield Company v. Evatt*, 143 O. S. 58, 28 O. O. 16, 54 N. E. (2d) 149.

We come now to section 5328-2, General Code, which provides, with reference to the situs of accounts receivable, as follows:

“Property of the kinds and classes herein mentioned, when used in business shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

“In the case of accounts receivable, when resulting [fol. 159] from the sale of property sold by an agent

having an office in such other state or from a stock of good maintained therein, or from services performed by an officer, agent or employe connected with, sent from or reporting to any officer or at any office located in such other state. * * *

Said section also provides that:

“The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances.”

This reciprocal provision indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this Board has no right to declare a statute unconstitutional. *Hillsborough Township v. Cromwell*, 90 L. Ed. 298; *Schwartz v. Essex* [fol. 160] *County Board of Taxation*, 129 N. J. L., 129 affirmed 130 N. J. L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court. In the case of *National Cash Register Company v. Evatt*, 145 O. S., 597, 31 O. O., 218, 42 O. L. A., 545, 15 O. Supp. 144, 62 N. E. (2d), 327, the Court held that accounts receivable of the company, a Maryland corporation, which arose from sales made outside of Ohio of goods filled by

shipment from its manufacturing plant in Ohio, were taxable in this state. The Court said:

“We direct our attention first to the question whether the accounts receivable, arising from sales outside Ohio and filled from a stock of goods in Ohio, have an Ohio situs for purpose of taxation.”

In referring to section 5328-2, General Code, the Court said:

“Applying that section to the facts in the instant case, it means that accounts receivable belonging to a Maryland corporation, when resulting from sales of property by an agent having an office in Ohio or *from a stock of goods maintained in Ohio*, shall be considered to arise out of business transacted in Ohio.”

It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a [fol. 161] stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The Board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118, decided by this Board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the Board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

For the foregoing reasons the Board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, there-

fore, arose out of business transacted in this State and consequently, are taxable here.

No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this State. As to this, section 5328-2, General Code, provides that prepaid items [fol. 162] when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The Board finds that these prepaid items relate to property used in appellant's business in this State and, in view of the above statutory provisions, arose out of business transacted in this State and are, therefore, taxable.

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

Edward J. Kirwin, Secretary.

[fol. 163] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 164] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD
—Filed December 6, 1948

Appellant, Wheeling Steel Corporation, adopts its assignments of error as its statement of the points to be relied upon, and says that the whole of the record, as filed, is necessary for the consideration of the case.

Wheeling Steel Corporation, by ————, John Caren, Its Attorneys.

Proof of Service

Receipt of a true copy of the above statement and designation is hereby acknowledged this 4th. day of December, 1948.

C. Emory Glander, Tax Commissioner of Ohio.

[fol. 164a] [File endorsement omitted.]

[fol. 165] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 3, 1949

The statement of Jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 53,449, Ohio, Supreme Court. Term No. 447. Wheeling Steel Corporation, Appellant, vs. C. Emory Glander, Tax Commissioner of Ohio. Filed December 6, 1948. Term No. 447 O.T. 1948.

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 448

NATIONAL DISTILLERS PRODUCTS CORPORATION,
NEW YORK, APPELLANT,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF
OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED DECEMBER 6, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 448

NATIONAL DISTILLERS PRODUCTS CORPORATION,
NEW YORK, APPELLANT,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF
OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] [File endorsement omitted]

[fol. 2] **IN THE SUPREME COURT OF OHIO**

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION, New York,
New York, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner, State of Ohio,
Appellee

PETITION FOR APPEAL FROM THE SUPREME COURT OF OHIO—
Filed October 29, 1948

To the Honorable Carl V. Weygandt, Chief Justice of the
Supreme Court of Ohio:

Now comes National Distillers Products Corporation, the above named appellant, by its Attorney, Isadore Topper, and complains and allèges that it is a corporation duly organized and existing under the laws of the State of Virginia, having its principal office and place of business in the City and State of New York; that it is qualified to do business as a foreign corporation in the State of Ohio; that in the above entitled matter on the 4th day of August, 1948, an opinion and decision ruling against appellant was rendered by the Supreme Court of the State of Ohio, which opinion and decision became a final judgment of the Supreme Court of Ohio on the 6th day of October, 1948, upon the overruling by said Court of the application of appellant for a rehearing; that said opinion, decision and final judgment was [fol. 3] made and rendered by the highest court in the State of Ohio; and that in said opinion, decision and final judgment, it was adjudged that Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as applied by the Tax Commissioner of Ohio, assessing personal property taxes upon intangible personal property of appellant, to-wit, accounts receivable arising out of sales made, approved and completed in other states of goods manufactured in and shipped from the plant of appellant in Ohio, are not in conflict with the provisions of Section 8 of Article I of the Constitution of the United States nor in conflict with the Fourteenth

Amendment to the Constitution of the United States; and that it was further adjudged that the application of said statutes by the Tax Commissioner of Ohio did not deprive your petitioner of the rights, privileges or immunities secured to the citizens and corporations of the United States and the State of Ohio, nor did said application of said statutes deprive appellant of property without due process of law, nor did such application of said statutes deprive appellant of the equal protection of the law; and that it was further adjudged that said statutes as applied by the Tax Commissioner did not constitute a burden on interstate commerce.

Appellant has filed with this petition with the Clerk of said Supreme Court of the State of Ohio, an Assignment of Errors setting out separately and particularly each error asserted by it, and also presents herewith a separate statement particularly disclosing the basis upon which it is [fols. 4-44] contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Wherefore, your petitioner prays the allowance of an appeal from said judgment of the Supreme Court of the State of Ohio to the Supreme Court of the United States, to the end that the record in said matter may be removed into the said Supreme Court of the United States and the errors complained of by your petition may be examined and corrected and said judgment reversed, and a judgment rendered in favor of the appellant and for costs.

National Distillers Products Corporation, Appellant,
by Isadore Topper, Its Attorney.

[fol. 45] [File endorsement omitted.]

[fol. 46] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 29, 1948

National Distillers Products Corporation, appellant herein, assigns the following errors in the record and proceedings of this case:

(1) *Unconstitutional Burden on Interstate Commerce*

The Supreme Court of the State of Ohio erred in holding and deciding that the determination, finding, assessment and order of the Department of Taxation of the State of Ohio, as made and entered by the Tax Commissioner of the State of Ohio and affirmed by the Board of Tax Appeals of the State of Ohio against appellant, a Virginia corporation, with its principal commercial and business office in New York City, that the accounts receivable of the appellant, a foreign corporation, arising out of sales made and completed in other states by its agents and employees in other states from goods manufactured in and shipped from Ohio on instructions from its principal business office in another state, and which accounts receivable are payable outside of Ohio, and on payments thereon deposited in banks in other [fol. 47] states, had a tax situs in Ohio and were allocable to Ohio for the purpose of taxation, did not constitute an unconstitutional burden on interstate commerce within the meaning of Section 8 of Article I of the Constitution of the United States, and that the provisions of Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as so interpreted and applied by the Tax Commissioner of Ohio and the Board of Tax Appeals of the State of Ohio were not contrary to nor in violation of Section 8 of Article I of the Constitution of the United States.

(2) *Denial of Due Process of Law*

The Supreme Court of Ohio erred in holding and deciding that said determination, finding, assessment and order of the Department of Taxation of the State of Ohio, as made and entered by the Tax Commissioner of Ohio and affirmed by the Board of Tax Appeals of the State of Ohio against appellant herein did not constitute a denial of due process of law to appellant herein, in that such taxation of such

accounts receivable did not constitute a taking of said property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, and that the provisions of Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as so interpreted and applied by the Tax Commissioner of Ohio and the Board of Tax Appeals of the State of Ohio were not contrary to nor in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[fols. 48-49] (3) *Denial of Equal Protection of Law*

The Supreme Court of Ohio erred in holding and deciding that said determination, finding, assessment and order of the Department of Taxation of the State of Ohio, as made and entered by the Tax Commissioner of Ohio and affirmed by the Board of Tax Appeals of the State of Ohio against appellant herein, did not constitute a denial to appellant of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States and that the provisions of Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as so interpreted and applied by the Tax Commissioner of Ohio were not contrary to nor in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, National Distillers Products Corporation, appellant herein, for said errors prays that the said judgment of the Supreme Court of the State of Ohio, rendered October 6, 1948, upon the opinion and decision of said court dated August 4, 1948, be reversed and that the judgment be rendered in favor of the appellant herein, and for costs.

National Distillers Products Corporation, Appellant,
by Isadore Topper, Its Attorney.

[fol. 50] [File endorsement omitted.]

[fol. 51]

IN THE SUPREME COURT OF OHIO

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION, New York,
New York, Appellant,

vs.

C. EMOBY GLANDER, Tax Commissioner, State of Ohio,
Appellee

ORDER ALLOWING APPEAL—Filed November 2, 1948

The appellant in the above entitled case having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled case by the Supreme Court of Ohio on the 6th day of October, 1948, upon the opinion and decision of said Supreme Court of Ohio of August 4, 1948, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors, Prayer for Reversal and Statement of Jurisdiction pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same ~~is~~ hereby, allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled case, as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme Court of the United States so that he shall have the same in said Court within forty days from the date [fols. 52-54] hereof.

And it is further ordered that security for costs on appeal be fixed at the sum of \$500.00, and that upon approval of bond in said amount this order shall operate as a superse-deas.

Dated at Columbus, Ohio this 30 day of October, 1948.

Carl V. Weygandt, Chief Justice of the Supreme
Court of Ohio.

[fols. 55-56] Citation in usual form, filed Nov. 2, 1948,
omitted in printing.

[fols. 57-63] [File endorsement omitted.]

[fol. 64] IN THE SUPREME COURT OF OHIO

[Title omitted]

PRECIPUE FOR TRANSCRIPT OF RECORD—Filed November 2, 1948

To the Clerk of the Supreme Court of Ohio:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above styled cause, and to include in said transcript of record the following papers and documents, to-wit:

(1) The transcript of the record on appeal from the Board of Tax Appeals to the Supreme Court of Ohio in its entirety;

(2) Opinion and Entry of the Board of Tax Appeals in this cause filed March 12, 1947;

(3) Notice of Appeal to the Supreme Court of Ohio from the Board of Tax Appeals decision in this cause filed by appellant herein;

(4) Assignments of error filed by appellant in the Supreme Court of Ohio from decision and order of the Board of Tax Appeals in this cause;

[fol. 65] (5) Opinion and decision of the Supreme Court of Ohio rendered in this cause on August 4, 1948;

(6) Application for rehearing filed by appellant herein in the Supreme Court of Ohio on August 16, 1948;

(7) Order of the Supreme Court of Ohio denying said application for rehearing, entered October 6, 1948;

(8) Petition for appeal to the Supreme Court of the United States filed by appellant herein;

(9) Assignments of error with respect to the decision and judgment of the Supreme Court of Ohio in this cause, filed by appellant herein;

(10) Order of the Supreme Court of Ohio allowing appeal;

(11) Citation on appeal to C. Emory Glander, Tax Commissioner of the State of Ohio, signed by the Chief Justice of the Supreme Court of Ohio;

(12) Certificate as to federal question involved signed by the Chief Justice of the Supreme Court of Ohio;

(13) The bond for costs of appeal and approval thereof;

(14) This precipe with acknowledgment and waiver of counter precipe.

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Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 9th day of December, 1948.

Isadore Topper, Attorney for Appellant.

[fols. 66-67] Service of the foregoing precipe upon the undersigned is hereby acknowledged and right of filing counter precipe is hereby waived, this 2nd day of November, 1948.

C. Emory Glander, Tax Commissioner, by Hugh S. Jenkins, Attorney General of Ohio, by Aubrey A. Wendt, Asst. Atty. General, Attorneys for Appellee.

[fol. 68] [File endorsement omitted.]

[fol. 69] IN THE SUPREME COURT OF OHIO

[Title omitted]

SUPPLEMENTAL PRECIPE—Filed November 2, 1948

To the Clerk of the Supreme Court of Ohio:

You are hereby requested to include in the transcript of record heretofore called for by Precipe for Transcript of Record filed herein, which transcript is to be filed in the Supreme Court of the United States, the following additional documents, to-wit:

- (1) Stipulation of Facts filed with the Board of Tax Appeals of Ohio in this cause and notice to appellee of allowance of appeal;
- (2) Printed record in this cause in its entirety;
- (3) This precipe, with acknowledgment and waiver of counter precipe.

Said foregoing documents to be prepared as required by law and filed as a part of the transcript of the record herein in the office of the Clerk of the Supreme Court of the United States on or before the 9th day of December, 1948.

Isadore Topper, Attorney for Appellant.

[fols. 70-72] Service of the foregoing supplemental precept upon the undersigned is hereby acknowledged and right of filing counter precept is hereby waived, this 2d day of November, 1948.

Aubrey A. Wendt, Assistant Attorney General of Ohio for C. Emory Glander, Tax Commissioner of Ohio.

[fol. 73] IN THE SUPREME COURT OF OHIO

[Title omitted]

CERTIFICATE AS TO FEDERAL QUESTION INVOLVED

It is certified that the above entitled cause came on for hearing in the Supreme Court of Ohio upon the record of proceedings, the stipulation of facts, and the briefs and arguments of counsel, and that at each stage of the proceedings in this case substantial federal questions were raised by and argued and urged by appellant, to-wit: (1) That Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as said sections have been applied by the Tax Commissioner of Ohio in this case, are contrary to and in violation of Section 8 of Article I of the Constitution of the United States; (2) That said Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as applied in this case by the Tax Commissioner of Ohio, are contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Such questions were raised by appellant in its application for review and redetermination of the assessment of the Tax Commissioner (R. 2, 3), in its petition on appeal filed [fols. 74-75] with the Board of Tax Appeals of Ohio on January 16, 1946 (R. 8) and in its assignments of error and brief filed with the Supreme Court of Ohio.

With respect to such substantial federal questions, the Tax Commissioner of Ohio found and determined that he did not have authority to set aside acts of the legislature on constitutional grounds and the Board of Tax Appeals found that it was without authority to consider and determine questions of constitutionality of statutes of the State of Ohio. Further, with respect to substantial federal constitutional questions, the Supreme Court of Ohio held

that said Sections 5325-1, 5328-1 and 5328-2 as applied by the Tax Commissioner of the State of Ohio in this case were not contrary to nor in violation of Section 8 of Article I of the Constitution of the United States nor contrary to nor in violation of the Fourteenth Amendment to the Constitution of the United States.

Witness the Honorable Supreme Court of Ohio this 30 day of October, 1948.

Supreme Court of Ohio, By Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 76-78] Bond on appeal for \$500.00, approved and filed Nov. 5, 1948, omitted in printing.

[fol. 79] IN THE SUPREME COURT OF OHIO, JANUARY TERM 1947

31037

Title of Case: NATIONAL DISTILLERS PRODUCTS CORPORATION, NEW YORK, NEW YORK, Appellant

vs.

EMORY GLANDER, Tax Commissioner, State of Ohio, Appellee

Attorneys: Isadore Topper, 306 Huntington Bl. Bldg., Columbus 15, Ohio.

Hugh S. Jenkins, Daronne R. Tate, Columbus, Ohio.

Action: Appeal from the Board of Tax Appeals #11118.

MEMORANDA OF PLEADINGS, &c., FILED, WRITS ISSUED, &c.
 Apr. 2, 1947. Notice of Appeal & proof of service filed.
 Apr. 18, 1947. Transcript of record & abstract of docket of Board of Tax Appeals filed.
 Apr. 18, 1947. Cause docketed.
 Apr. 18, 1947. Papers taken by Rodenfels. 5/21/47 returned.
 Apr. 28, 1947. Appellant's printed brief & proof of service filed.

May 16, 1947 Entry extending time for filing printed record to June 2, 1947. Carl V. Weygandt, C. J. J. 38-384.

June 3, 1947 Entry extending time for filing printed record herein to June 12, 1947. Carl V. Weygandt, C. J. J. 38-395.

June 4, 1947 Application of Squire, Sanders & Dempsey for leave to file brief Amicus Curiae herein filed.

June 4, 1947 Entry granting Squire, Sanders & Dempsey leave to file brief Amicus Curiae on or before June 25, 1947. Carl V. Weygandt, C. J. J. 38-401.

[fol. 80] June 6, 1947. Printed record filed. 6/9/47 P. S. filed.

June 12, 1947. Printers receipted bill filed.

June 26, 1947. Printed brief Amicus Curiae of Squire, Sanders & Dempsey / same as 31079, 31081 / filed. 7/5/47 P. S. filed. acknowledgement of service filed 7/10/47.

Oct. 3, 1947. Leave to file Appellee's brief instanter filed.

Oct. 3, 1947. Appellee's printed brief & A of S filed. 10/6/47 P. S. filed.

Aug. 4, 1948. Decision affirmed. J. 38-684.

Aug. 7, 1948. Notification received of application for rehearing to be filed.

Aug. 16, 1948. Application for rehearing & proof of service filed.

Oct. 6, 1948. Rehearing denied. J. 39-2.

Oct. 29, 1948. Petition for appeal to United States Supreme Court filed.

Oct. 29, 1948. Statement in support of jurisdiction filed.

Oct. 29, 1948 Assignments of error filed.

Nov. 2, 1948. Order allowing appeal filed.

Nov. 2, 1948. Citation filed.

Nov. 2, 1948. Proof of service of all papers filed.

Nov. 2, 1948. Certificate as to Federal Question involved filed.

Nov. 2, 1948. Precipe for transcript of record filed.

Nov. 2, 1948. Supplemental precipe for transcript filed.

Nov. 3, 1948. Notice to appellee filed.

[fol. 81]

JOURNAL ENTRIES

31037. Friday May 16, 1947. Entry. Upon application of appellant and for good cause shown, it is ordered that the time for filing printed record herein be, and the same hereby

is, extended, to June 2, 1947. Carl V. Weygandt, C. J. J. 38, Page 384.

31037. Monday, June 2, 1947. Entry. Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record herein be, and the same hereby is, extended to June 12, 1947. Carl V. Weygandt, C. J. J. 38, Page 395.

31037. Wednesday, June 4, 1947. Entry. Upon application and for good cause shown, it is ordered that Squire, Sanders & Dempsey are hereby given leave to file brief amicus curiae herein on behalf of appellant on or before June 25, 1947. Carl V. Weygandt, C. J. J. 38, Page 401.

JUDGMENT.

31037. Wednesday, August 4, 1948. Appeal from the Board of Tax Appeals: This cause came on to be heard upon the transcript of the record of the Board of Tax Appeals of Ohio and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed for the reasons stated in the opinion rendered herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals of Ohio, to carry this judgment into Execution. J. 38, Page 684.

ORDER DENYING REHEARING

31037. Wednesday, October 6, 1948. Rehearing Docket. [fol. 82] Upon consideration of the application for rehearing herein, it is ordered by the Court that rehearing be, and the same hereby is, denied. J. 39, Page 2.

[fol. 83] IN THE SUPREME COURT OF OHIO

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION, NEW YORK,
New York, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner, State of Ohio,
Appellee.

NOTICE OF APPEAL FROM FINDING, ORDER AND DECISION OF THE
BOARD OF TAX APPEALS OF THE STATE OF OHIO—Filed April
2, 1947

The appellant, National Distillers Products Corporation, hereby gives notice that it is appealing from the Board of Tax Appeals to the Supreme Court of Ohio, a finding, order and decision made by the Board of Tax Appeals of the Department of Taxation of the State of Ohio, in cause number 11118 on the docket of said Board of Tax Appeals on the 12th day of March, 1947, and which finding, order and decision made by the Board of Tax Appeals in the aforesaid cause, reads as follows:

“Before the Board of Tax Appeals, Department of Taxation of Ohio

No. 11118

NATIONAL DISTILLERS PRODUCTS CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

ENTRY

This cause and matter came on for consideration by [fol. 84] the Board of Tax Appeals upon an appeal filed herein by the appellant, above named, from a final order of the tax commissioner denying an application theretofore filed by the appellant for the review and correction of an additional intangible personal property tax assessment in the amount of \$8,990.01 made against it for the tax year 1944. The case was heard and submitted to the Board upon said appeal, on a transcript of the proceedings before the

tax commissioner relating to the additional tax assessment made against it, upon a stipulation of the facts in the case and on the briefs and arguments of counsel.

It appears from the facts thus presented that appellant is a corporation organized and existing under the laws of the State of Virginia where its stockholders' meetings are held. The principal business of the corporation is in the city of New York where all of its executive offices are located; and all of its business activities are governed and controlled from its offices in New York. All of its accounts payable were paid from funds on deposit in New York. The corporation has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton County, Ohio; and it sells its products in every state where such products may be legally sold. Pay roll checks for employes of these several plants and checks for federal excise taxes due from said plants, including the one located at Carthage, Ohio, were paid with funds on deposit in banks in these several localities where such plants are located. These funds were obtained through checks drawn at the office of the corporation in New York on banks in said city. All accounts receivable were posted in the books of the corporation in the City of New York where such accounts were payable and where all of its receipts were deposited.

The accounts receivable here in question, the allocation of which resulted in the additional intangible property tax assessment complained of, arose from the sale of products manufactured by the corporation at its plant in Carthage, Ohio, which products were shipped from a stock of goods maintained by the corporation at its Carthage, Ohio plant to points in the State of Ohio and elsewhere throughout the United States. All orders for the sale of these products were solicited by agents outside of Ohio—no such sales agents being located in this State—, which orders were forwarded to New York and were subject to acceptance or rejection by the office of the corporation in said city. When such orders were accepted by the New York office, shipping orders were forwarded from that office to the Ohio plant from which the products were shipped to points in the State of Ohio and elsewhere pursuant to such sales orders so made and accepted; and no shipments or deliveries from the Ohio plant were made except those confirmed by such shipping orders. As above indicated, all checks in payment of

the purchase price of the products of the company sold by the company and delivered from its plant at Carthage, Ohio, pursuant to such sales orders, were made payable to the [fol. 85] company at its office in New York City. In this connection it does not appear that any of the accounts receivable or of the moneys received by the company in payment of the same were used by the company in connection with its business in Ohio as distinguished from the general business of the company; but on the contrary, it does appear that such accounts receivable and the avails thereof were used by the appellant in its business generally and wherever conducted.

From the stipulation of facts filed herein it appears that during the calendar year 1943 the corporation shipped \$166,044,382.00 worth of its products from all of its plants and warehouses throughout the United States wherever manufactured, and included in the aggregate amount and value of such products were products of the amount and value of \$56,819,430.00 which, during said calendar year, were shipped from its said plant and plant warehouses in Ohio to customers throughout the United States.

It appears that the appellant, in filing its annual intangible and personal property return for the tax year 1944, did not allocate any of its accounts receivable to the State of Ohio; and that thereafter the tax commissioner, on audit of said annual return, corrected the same by ascribing an Ohio situs to a part of the accounts receivable of the appellant in the sum of \$2,996,670.00, which accounts receivable, amounting to 34.2191% of all of its accounts receivable for the calendar year 1943, arose from sales of its products which were shipped from its plant and plant warehouses in Ohio to customers throughout the United States.

The question presented in this appeal as to whether or not the tax commissioner erred in allocating said accounts receivable to the State of Ohio and in including the same as a part of the taxable property of the appellant for the tax year 1944, requires a consideration of the pertinent provisions of sections 5328-1 and 5328-2, General Code. Section 5328-1, General Code, which is the declaratory section with respect to the taxation of intangible property, provides generally that all moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as pro-

vided in said section or as otherwise provided or exempted in the title of which this section is a part. This section further provides as follows:

Property of the kinds and classes mentioned in section 5328-2 of the General Code (including accounts receivable), used in and arising out of business transacted in this state by, for or on behalf of a non-resident person . . . shall be subject to taxation, and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons . . . shall not be subject to taxation.

[fol. 86] Section 5328-2, General Code, provides:

Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state. . . .

This section further provides as follows:

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident per-

son, such decision shall be deemed also to effect such provision as applied to property of a resident, but shall not affect any other provision hereof.

Section 5325-1, General Code, which defines the term 'used in business' in connection with the taxation of tangible and intangible personal property, provides, among other things, as follows:

"Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. "Business" includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Referring to the above quoted statutory provisions and, [fol. 87] particularly, to the provision of section 5328-2, General Code, that 'the provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this State shall be taxed herein and no property of such kinds and classes belonging to a person residing in this State and having a business situs outside of this State shall be taxed', it may be observed that these statutory provisions indicate a policy to treat, so far as possible, domestic corporations and other residents of this state on one hand, and foreign corporations and other nonresidents on the other hand, on a basis of equality with respect to the taxation of business intangibles. Although the term 'business situs', as used in the above quoted provision of section 5328-2, General Code, is not therein further defined, we are admonished in and by the decision of the Supreme Court of this State in the case of *The Ransom & Randolph Company v. Evatt*, Tax Commr., 142 O. S. 398, 408, that section 5328-2, General Code, fixes the business situs of accounts receivable and other classes of intangible property therein referred to, and that, for this purpose, effect is to be given to this statute rather than to any general rule which might otherwise be applicable to cases of this kind.

On the consideration of the case of *The Ransom & Randolph Company v. Evatt*, when the same was before the

Board of Tax Appeals for decision, 25 O. O. 253, which case involved the question as to the taxable situs of the accounts receivable of an Ohio corporation which arose in the transaction of the business of the company in the States of Indiana and Michigan, this Board was required to construe and apply the statutory provisions above quoted and particularly the provision of section 5328-1, General Code, that 'all such property (accounts receivable and other kinds and classes of intangible property mentioned in section 5328-2, General Code) of persons residing in this State used in an arising out of business transacted outside of this state by, for and on behalf of such persons, * * * shall not be subject to taxation.' On a consideration of the statutory provisions above noted, the Board of Tax Appeals was of the view that before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicile of the taxpayer, it must appear, that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other state, but were therein so used as to become an integral part of the business carried on in such other state; and that it was not sufficient that such accounts receivable and other intangible property be used in business generally by the taxpayer. And on this view the Board held that the accounts receivable there in question, although they arose in the conduct of taxpayers' business in the States of Indiana and Michigan, did not have a business situs in such states, and that such accounts receivable were taxable in Ohio.

[fol. 88] On the appeal of the decision of the Board of Tax Appeals in The Ransom & Randolph Co. case to the Supreme Court of Ohio, that Court reversed the decision of the Board of Tax Appeals upon the point above indicated. 142 O. S. 398, 404. That Court, upon consideration of the applicable provisions of section 5328-2 and related sections of the General Code above noted, held that the accounts receivable of a taxpayer which arose in the conduct of its business in a state or states other than the state in which it had its domicile or place of residence, had a business situs in such other state or states if such accounts receivable or the avails thereof are being applied or are intended to be applied in the conduct of the taxpayer's business, whether in this State or elsewhere. This view of the Supreme Court as to the

construction to be placed upon the statutory provisions here in question was later followed by that Court in its decisions in the cases of *The Haverford Company v. Evatt*, Tax Commr., 143 O. S. 58, and *National Cash Register Company v. Evatt*, Tax Commr., 146 O. S. 597.

The appellant, as a corporation organized and existing under the laws of the State of Virginia, is a legal resident of that state; and as to the appellant corporation the State of Ohio is 'a state other than that in which the owner thereof resides' and 'such other state' within the provisions of section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this Board hereby finds—in the conduct of its business in the State of Ohio by the sale of its products from a stock of goods located in this State, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this State or elsewhere, such accounts receivable have a business and taxable situs in the State of Ohio, as found and determined by the tax commissioner.

With respect to a question such as that here presented, to wit, that as to the taxation of the accounts receivable of foreign corporation arising in the conduct of its business in this State, the application of the above noted provisions of sections 5328-1, 5328-2 and other related sections of the General Code, as the same have been construed by the Supreme Court, presents, to our mind, a serious question as to the constitutionality of said statutory provisions as so construed under the Due Process of Law Clause of the Federal Constitution. However, as to this, it is fair to state that recently the Supreme Court of the State of Georgia in the [fol. 89] case of *Parke, Davis & Co. v. Atlanta*, 200 Ga. 296, 163 A.L.R. 976, 36 SE (2d) 773, sustained a tax under the laws of that state on the accounts receivable of a foreign corporation which arose from the sale and delivery of its products from a stock of goods in the City of Atlanta in said state. The decision of the court on this point, as indi-

cated by the syllabi in the report of such decision, is as follows:

'Where a foreign corporation kept a stock of goods in a warehouse in the City of Atlanta, Ga.; orders were received and approved outside the state, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the City of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by the nonresident owner, for the merchandise sold in the municipality, are passed upon as to the credit of customers, and the books of account are kept, at a point without the City of Atlanta and the State of Georgia.

'Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment of the Constitution of the United States, or paragraphs 2 and 3 of section 1 in article 1 of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon, and the books of account kept by the corporation at a point without the state.'

With respect to the constitutional aspects of the question here represented, the Case of Parke, Davis & Co. v. Atlanta, supra, cannot be distinguished on the facts from the case at bar; for in that case, as in this, the accounts receivable which arose in the conduct of the taxpayer's business in the taxing state were not used otherwise than in the transaction of the taxpayer's business generally and as a whole.

Whatever the answer may be as to the constitutionality of the above quoted provisions of section 5328-1, 5328-2 and related sections of the General Code, as the same have been heretofore construed by the Supreme Court of this State, in their application to the facts of this case, it is quite clear

[fol. 90] that the Board of Tax Appeals, as an administrative and quasi judicial board or tribunal, has no jurisdiction and authority to consider and determine such constitutional question. See *Hillsborough Township v. Cromwell*, U. S. Sup. Ct., Case No. 197, 90 L. Ed., 298, 302; *Schwartz v. Essex County Board of Taxation*, 129 N. J. 129, 132, affirmed 130 N.J.L. 177. In the case last above cited it was said:

It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi-judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body.

The Board of Tax Appeals is, of course, bound by the above cited decisions of the Supreme Court of this State construing the above quoted statutory provisions as to the business situs of accounts receivable and other intangible property; and in this view the assessment and order of the tax commissioner complained of in this appeal is hereby affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

(S.) Edward J. Kirwin, Secretary. (Seal.)

The finding, order and decision of the Board of Tax Appeals of the State of Ohio, hereinabove quoted, is an affirmance of a certain finding, assessment, certification and order rendered by the appellee against the appellant, The National Distillers Products Corporation.

The appeal is on questions of law and is taken to the Supreme Court of Ohio in a case involving the revisory jurisdiction of the Supreme Court of Ohio from an order, [fol. 91] finding and decision made and entered by the Board of Tax Appeals of the State of Ohio. This appeal also involves constitutional questions.

National Distillers Products Corporation is the appellant and C. Emory Glander, Tax Commissioner of the State of Ohio, is the appellee herein.

Appellant says that there is error in said record and proceedings before the Board of Tax Appeals of the State of Ohio, in this, to-wit:

1. That the Board of Tax Appeals erred in approving and confirming the assessment, certification and order made against the appellant by the appellee for intangible personal property taxes for the year 1944;

2. That the Board of Tax Appeals erred in approving and confirming the determination, finding, assessment and order of the Department of Taxation of the State of Ohio, as made and entered by the Tax Commissioner of the State of Ohio, appellee herein, against the appellant, a Virginia corporation, with its principal commercial and business office in New York City, that the accounts receivable of the appellant, a foreign corporation, arising out of sales made and completed in other states by its agents and employees in other states, from goods manufactured in and shipped from Ohio on instructions from its principal business office in another state, and which accounts receivable were payable outside of Ohio, and all payments thereon deposited in banks [fol. 92] in other states, had a tax situs in Ohio and were allocable to Ohio for the purpose of taxation;

3. That the Board of Tax Appeals erred in approving and confirming the action of the appellee herein in finding and determining that the aforesaid accounts receivable of the appellant, a foreign corporation, not used in or arising out of business transactions in Ohio, had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

4. That the Board of Tax Appeals erred in approving and confirming the finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were taxable in Ohio under Section 5328-1 and 5328-2 of the General Code of Ohio;

5. That the finding, determination, assessment and order of the appellee, approved and confirmed by the Board of Tax Appeals, that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation and taxable in Ohio, is contrary to and violates Sec-

tion 8 of Article I of and the Fourteenth Amendment to the Constitution of the United States; and Section 1, 2 and 19 of Article I of the Constitution of the State of Ohio;

6. That the Board of Tax Appeals erred in failing to determine and decide whether Section 5328-2 of the General Code of Ohio as interpreted and applied by the appellee with reference to the aforesaid accounts receivable of the appellant, violates Section 1, 2 and 19 of Article I of the Constitution of the State of Ohio and Section 8 of Article I of and the Fourteenth Amendment to the Constitution of the United States;

[fol. 93]. 7. That the Board of Tax Appeals erred in failing to reverse or vacate the determination, finding, assessment and order of the appellee made against the appellant taxing the accounts receivable of the appellant arising out of sales made and completed in other states by its agents and employees in other states from goods manufactured in and shipped from Ohio on instructions from its principal office in another state, and which said accounts receivable were payable outside of Ohio and payments thereon deposited in banks outside of Ohio;

8. That the decision and judgment of the Board of Tax Appeals with respect to the listing, assessing and taxing of the aforesaid accounts receivable of the appellant is unreasonable and unlawful.

(S.) Isadore Topper, Attorney for Appellant.

[File endorsement omitted.]

[fol. 94]

IN SUPREME COURT OF OHIO

[Title omitted]

Appeal from the Board of Tax Appeals

RECORD—Filed June 6, 1947

(Here follows 1 Photolithograph, side folios 95-96)

STATE OF OHIO

National Distillers Products Corp.
120 Broadway
New York, New York

N-11

Tax Form No. 905 V
Prescribed by
Tax Commissioner, State of Ohio

NO. 1289

(TAX COMMISSIONER'S COPY)
PRELIMINARY ASSESSMENT CERTIFICATE

The Tax Commissioner hereby certifies that the following is the preliminary assessment of the taxable property of the above named taxpayer chargeable on the Intangible Property Tax List and Duplicate of the Auditor of State for the year 1945. 1944 - Dec. 5, 1945

RET. FORM NO. 943

CLASSIFIED TAX LIST	TOTAL			RATE	AMOUNT OF TAX		
Investments yielding income	\$			5%	\$		
Investments not yielding income				2 mills			
Deposits				2 mills			
Credits		2	996	3 mills	8	990	01
Moneys and other taxable intangibles				4 mills			
TOTAL CLASSIFIED TAX	\$				\$		

(SEAL) Assessment under decision of the Supreme Court of
Ohio in the case of The Ransom and Randolph Company
v. Evatt, Tax Commissioner (142 O. S. 398)
No former assessment for this company


Tax Commissioner

C O P Y

95-06

221

[fol. 96a] BEFORE THE DEPARTMENT OF TAXATION, STATE OF
OHIO

In the Matter of the Application for Review and Redetermination of the National Distillers Products Corp.

Application for Review and Redetermination

Now comes the National Distillers Products Corporation, and herewith makes application for review and redetermination of the personal property tax assessment for the year 1944 made against it on December 5, 1945, based on the decision of the Supreme Court of Ohio in Ransom and Randolph v. Evatt, 142 O. S., 398, for the following reasons:

1. No personal property (credits) taxable in Ohio was omitted from its 1944 return;

2. That the credits taxed by the preliminary assessment certificate issued on December 5, 1945, against the undersigned corporation, a foreign corporation, with its principal office and place of business outside the state of Ohio, arose out of sales made and completed in other states, with the said accounts receivable payable outside of Ohio and the avails thereof used outside of Ohio;

3. That the aforesaid credits taxed by the aforesaid preliminary assessment certificate issued on December 5, 1945, did not arise out of business transacted in Ohio and were not used in Ohio;

4. That the determination and assessment made by the tax commissioner that the aforesaid accounts receivable [fol. 97] of the National Distillers Products Corporation are allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of Section 8 of Article 1 of, the Fourteenth Amendment to the Constitution of the United States, and in Sections 1 and 19 of Article 1 of the Constitution of the state of Ohio.

National Distillers Products Corporation, By: Secy-
Treas. (S.)

BEFORE DEPARTMENT OF TAXATION, STATE OF OHIO

DECISION OF TAX COMMISSIONER—Filed January 8, 1946

The application of the National Distillers Products Corporation, (Inter-county), New York, New York, for review

and redetermination of an additional intangible personal property tax assessment against such applicant for the year 1944, after being duly heard, came on to be considered.

The tax commissioner, being fully advised in the premises, finds that part of the assessment complained of imposed an additional tax upon the applicant in that certain of its "accounts receivable" were given an Ohio situs for the purpose of computing its "net taxable credits" for the year here under consideration, whereas the applicant had not allocated any of its "receivables" into Ohio for such purpose.

The tax commissioner, being further advised in the premises, and in view of the decision of the Ohio Supreme Court in the case of Ransom and Randolph v. Evatt, 142 O. S., 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code, finds that the assessment as heretofore made by this department with [fol. 97a] respect to the item of "net taxable credits" was in every respect proper.

The applicant at the time of said hearing contested the validity of such assessment with respect to allocating to Ohio certain of its "accounts receivable" on the grounds that the provisions of Section 5328-2, General Code, are not applicable and further that the construction of Sections 5325-1 and 5328-2, General Code, adopted by the tax commissioner, is in violation of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the state of Ohio for, as construed, such sections operate to tax intangible property of a nonresident over which Ohio has no jurisdiction and which has no business situs in Ohio. As to such contention, the tax commissioner holds that he is without authority to set aside acts of the legislature on constitutional grounds.

In addition to the foregoing contentions the applicant at the time of such hearing also raised the issue that the assessment was illegal and improper in that the "accounts receivable" which this department allocated to Ohio did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the tax commissioner that the "receivables", as heretofore allocated to Ohio, did result from the sale of property from a stock of goods

maintained within this state and such contention is accordingly denied.

In view of the foregoing, it is, therefore, ordered by the tax commissioner that the application for review and re-determination be and the same is hereby denied.

Department of Taxation, C. Emory Glander, Tax Commissioner.

[Duly certified.]

[fol. 98] BEFORE DEPARTMENT OF TAXATION, STATE OF OHIO

CORPORATION RETURN OF TAXABLE PROPERTY FOR 1944

Name of corporation, National Distillers Products Corporation.

This return is made by the above named corporation as holder of fifty-one per cent or more of the common stock of the following named corporations:

Name, W. & A. Gilbey, Ltd.; address, 120 Broadway New York 5, New York; state in which organized, Delaware; date of organization, 2-27-35; number of shares of outstanding common stock, 1,550,000; number owned by reporting company, 1,033,333; number shares owned by Ohio individuals, none.

Intangible Property

Bonds, notes, mortgages, debentures, contracts, investment trust shares, deposits, proceeds of matured insurance, patent and copyright royalties, annuities, interest in trust funds, note.

Recapitulation of Classified or Intangible Personal Property

Total Listed Values and Amounts

Item 4, credits—2,996,670. \$8990.01.

Assessment under decision of the Supreme Ct. of Ohio in the case of R. R. Co. v. Evatt, 142 O. S., 398.

H. D. 5 12-5-45.

(Matter in boldface type inserted in the return by the department of taxation.)

[fol. 98a]

National Distillers Products Corp.
and
W. A. Gilbey, Ltd.

		1944 Return	
		A	C
1944	National Distillers	Deductions	Receivables and Prepaid
B/S Line 17	Notes and/or Accts. Rec.		\$13,969,267.00
B/S Line 40	Prepaid Insurance		470,316.00
B/S Line 41	Prepaid Taxes		40,200.00
B/S Line 43	Prepaid Others		291,674.00
			<hr/> 14,771,457.00
B/S Line 95	Notes Payable	\$ 35,931.00	
98	Trade Payables	*3,644,962.00	
102	Acc'd Interest	321,045.00	
107	Acc'd Other	1,685,959.00	
116	Dividends Payable	1,022,724.00	
			<hr/> 6,710,621.00
Total Deductions			8,060,836.00
Credits C-A			
Credits taxable in Ohio 34.2091% (Bus. Fraction)			2,757,540.00
Tax @ 3M			8,272.62
<p>* B/S amount of Accts. Payable was reduced by the amount of Accts. Rec. shown on W & A Gilbey B/S \$281,544.00</p>			

[fol. 99]

1944	W & A Gilbey, Ltd.		
B/S Line 13	Notes and/or Accts Rec.		-0-
B/S Line 40	Prepaid Insurance		1,239.00
B/S Line 41	Prepaid Taxes		1,220,128.00
B/S Line 43	Prepaid Other		1,034.00
			<hr/> 1,222,401.00
B/S Line 95	Notes Payable	750,000.00	
98	Trade Payable	133,201.00	
107	Acc'd Other	17,149.00	
			<hr/> 900,350.00
Total Deductions			322,051.00
Credits C-A			
Credits taxable in Ohio 74.2537% (Bus. Fraction)			239,130.00
Tax @ 3M			717.39
<p>* Notes and/or Accts. Rec. in amount \$281,554.00 were entirely eliminated as these accts. were owned by the parent company.</p>			
National		\$2,757,540.00	
Gilbey		239,130.00	
			<hr/> 2,996,670.00
Total			8,990.01
Tax @ 3M			

[fol. 99a] BEFORE BOARD OF TAX APPEALS OF OHIO, DEPARTMENT OF TAXATION

PETITION ON APPEAL—Filed January 16, 1946

Appellant says there is error in said record and proceedings before the appellee, C. Emory Glander, tax commissioner of the state of Ohio, in this, to wit:

1. The appellee erred in denying the application of the appellant for review and correction of an additional intangible personal property tax assessment made against the appellant for the year 1944;

2. The appellee erred in finding and determining that the accounts receivable of the appellant, a foreign corporation, arising out of sales made and completed in other states by its agents in other states and delivered in other states from goods manufactured in Ohio had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

3. The appellee erred in finding and determining that the accounts receivable of the appellant, a foreign corporation not used in or arising out of business transacted in Ohio, had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

4. The finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were taxable in Ohio is contrary to Sections 5328-1 and 5328-2 of the General Code of Ohio;

5. The finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of Section 8 of Article 1 of and the Fourteenth Amendment to the [fols. 100-101] Constitution of the United States, and Sections 1 and 19 of Article I of the Constitution of the state of Ohio;

6. The finding, determination, assessment and order of the appellee is unreasonable and unlawful.

Wherefore, appellant prays that the Board of Tax Appeals, upon hearing this appeal, will find and determine that the order of the appellee denying the application of

the appellant for a review and redetermination of the additional intangible personal property tax assessment made against the appellant for the year 1944 by the appellee was issued in error, and that the finding, determination, assessment and order of the appellee, C. Emory Glander, tax commissioner of the state of Ohio, be reversed, vacated and set aside, and that the appellee be ordered to make and correct his assessment in conformity with the order of the Board of Tax Appeals.

Isadore Topper, Attorney for Appellant.

[fol. 102]

IN SUPREME COURT OF OHIO

National Distillers Products Corp., Appellant, v. Glander, Tax Commr., Appellee.

National Distillers Products Corp., Appellant, v. Evatt, Tax Commr., Appellee.

Wheeling Steel Corp., Appellant, v. Glander, Tax Commr., Appellee.

United States Gypsum Co., Appellant, v. Evatt, Tax Commr., Appellee. (Two Cases.)

Taxation—Corporation franchise and intangible personal property—Foreign corporation maintained Ohio plants which completed orders sold—General books kept and orders accepted at principal office outside Ohio—Accounts receivable or avails thereof used in business generally—Prepaid insurance premiums on property located in Ohio—Sections 5325-1, 5328-1 and 5328-2, General Code.

(Nos. 31037, 31038, 31079, 31080 and 31081—Decided August 4, 1948)

Appeals from the Board of Tax Appeals.

Five cases are here involved.

Each appellant is a foreign corporation which operates at least one manufacturing plant in the state of Ohio. Of the five appeals two have been perfected by the National Distillers Products Corporation, a Virginia Corporation, one by the Wheeling Steel Corporation, a Delaware corporation, and two by the United States Gypsum Company, an Illinois corporation.

[fol. 103] In each case the Tax Commissioner of Ohio made an additional assessment of either intangible personal property tax or corporation franchise tax.

In each instance the order was appealed to the Board of Tax Appeals and was affirmed.

The cases are in this court for review on the contention of the appellant corporations that the decisions of the Board of Tax Appeals are unreasonable and unlawful.

OPINION *Per Curiam*

Mr. Isadore Topper, for appellant National Distillers Products Corporation.

Messrs. Dargusch, Caren, Greek & King, for appellant Wheeling Steel Corporation.

Messrs. Scott, MacLeish & Falk, Mr. Clarence D. Laylin, Mr. Charles M. Price, Mr. Clifford C. Pratt and Mr. Joseph A. Dubbs, for appellant United States Gypsum Company.

Mr. Hugh S. Jenkins, attorney general, and *Mr. Daronne R. Tate*, for appellee.

By the Court. These cases were presented together for the reason that all five of them involve similar questions of situs under the provisions of Sections 5328-1 and 5328-2, General Code.

These and cognate provisions have been discussed and applied in many recent decisions by this court. *Alluminum Co. of America v. Evatt, Tax Commr.*, 140 Ohio St., 385, 45 N. E. (2d), 118; *Procter & Gamble Co. v. Evatt, Tax Commr.*, 142 Ohio St., 369, 52 N. E. (2d) 517; *Ransom & Randolph Co. v. Evatt, Tax Commr.*, 142 Ohio St., 398, 52 N. E. (2d), 738; *Haverfield Co. v. Evatt, Tax Commr.*, 143 Ohio St., [fol. 104] 58, 54 N. E. (2d), 149; *C. F. Kettering, Inc., v. Evatt, Tax Commr.*, 144 Ohio St., 419, 59 N. E. (2d), 370; *National Cash Register Co. v. Evatt, Tax Commr.*, 145 Ohio St., 597, 62 N. E. (2d), 327; *American Rolling Mill Co. v. Evatt, Tax Commr.*, 147 Ohio St., 207, 70 N. E. (2d), 651.

Section 5325-1, General Code, reads as follows:

“Within the meaning of the term ‘used in business,’ occurring in this title, personal property shall be considered to be ‘used’ when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on

the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a nonresident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code, reads in part as follows:

"* * * Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code * * * shall be subject to taxation * * *"

[fol. 105] Section 5328-2, General Code, contains the following provisions:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state, * * *

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and

classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a nonresident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The facts relating to two of the companies here involved are not in dispute and are supplied by stipulations. The two concerning the National Distillers Products Corporation are ten and nine pages respectively in length and need [fol. 106] not be quoted in full for the purposes of this discussion. As above indicated, this company is a Virginia corporation. Its shareholders' meetings are held in that state. Its principal business office is located in the city of New York where the meetings of its directors are held and where all its business activities are controlled. All its accounts payable are paid from funds on deposit there. It has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton county, Ohio. It sells its products in every state where such products may be sold legally. Pay-roll checks for employees of these several plants and checks for federal excise taxes due from these plants are paid with funds on deposit in banks in those localities. The funds are obtained through checks drawn at the New York office on banks in that city. All accounts receivable are posted in the books of the company in the New York office where the accounts are payable. All the receipts are deposited in New York banks. The accounts receivable, the allocation of which resulted in the additional assessments of intangible property tax and corporation franchise tax, arose from the sale of products manufactured

by the company at its Carthage plant. The products were shipped from a stock of goods maintained by the company at that plant to points in Ohio and other states. All orders for the sale of these products were solicited by agents outside of Ohio. The orders were forwarded to New York and [fol. 107] were subject to acceptance or rejection at the New York office. When orders were accepted, shipping instructions were forwarded to the Ohio plant from which the products were then shipped to the designated points in Ohio and elsewhere. The moneys received from the accounts receivable were used by the company in its business generally wherever needed. In filing its annual report and tax return the company allocated none of its accounts receivable to Ohio.

In its opinion the Board of Tax Appeals correctly summarized the matter as follows:

"The appellant, as a corporation organized and existing under the laws of the state of Virginia, is a legal resident of that state; and as to the appellant corporation the state of Ohio is 'a state other than that in which the owner thereof resides' and such other state within the provisions of Section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this board hereby finds—in the conduct of its business in the state of Ohio by the sale of its products from a stock of goods located in this state, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this state or elsewhere, such accounts receivable have a business and taxable situs in the state of Ohio, as found and determined by the Tax Commissioner."

The company contends further that this interpretation of Section 5328-2, General Code, renders these provisions violative of the due-process and equal-protection clauses of [fol. 108] the state and federal constitutions. However,

this question was squarely and properly decided in the recent case of *Parke, Davis & Co. v. City of Atlanta*, 200 Ga., 296, 36 S. E. (2d), 773, 163 A. L. R., 976, in which the first and fourth paragraphs of the syllabus read as follows:

"1. Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the state, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the city of Atlanta, and would have a taxable situs for *ad valorem* taxation by said municipality, notwithstanding that the orders taken by the nonresident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the city of Atlanta and the state of Georgia. * * *

"4. Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment to the Constitution of the United States, or paragraphs 2 and 3 of Section 1 in Article I of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the state."

The facts concerning the Wheeling Steel Corporation are embodied likewise in a stipulation. As already stated, it is a Delaware corporation and maintains an office in that state. However, Wheeling, West Virginia, is the location of its principal office and place of business where all meetings of the shareholders, directors and executive committee are held. Its general books and accounting records are kept there. All credit is determined there; and the collections of notes and accounts receivable are made there. Four manufacturing plants are operated

in West Virginia and four in Ohio. Sales offices are maintained in twelve states—one in Ohio. When notes and accounts receivable are paid, the avails thereof are applied indiscriminately to the general purposes of the company's business, whether in Ohio or elsewhere. Pay rolls are prepared and pay-roll checks are prepared, signed and distributed at each plant. Bank balances sufficient for this purpose are maintained in each such community.

In its opinion the Board of Tax Appeals said in part:

"It is clear that under this statute (Section 5328-1, General Code) intangibles owner by a nonresident cannot be taxed unless they are both used in business in this state and arise out of business transacted here.

* * *

"Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this state and elsewhere, they must be held to be used in business within the meaning of this statute (Section 5325-1, General Code). * * *

"It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118, decided by this board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with

reference to a franchise tax assessment decided on the same date and bearing No. 9095.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state, and, consequently are taxable here.

"No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this state. As to this, Section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The board finds that these prepaid items relate to property used in appellant's business in this state and, in view of the above statutory provisions arose out of business transacted in this state and are, therefore, taxable."

[fol. 111] The facts concerning the United States Gypsum Company are presented by a stipulation of facts and the testimony of two witnesses.

This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All payroll checks are prepared and signed there and are drawn on funds there and in Ohio. Sales are managed and directed through divisional and district sales offices. Two district offices are located in Ohio. Orders taken by sale-men are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when

shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States, and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere.

[fol. 112] In its opinion the Board of Tax Appeals reached the following conclusion:

"The evidence shows that certain manufacturing or processing of the raw products, which were kept on hand at its Ohio plants in sufficient quantities to fill any orders that may be received, was necessary to convert them into the completed products ordered. This process took anywhere from approximately four minutes to less than one hour. The board is of the opinion that it makes no difference whether the products were put into their completed form before or after the orders therefor were accepted and received. The evidence shows that the appellant did maintain in Ohio a stock of goods which was necessary to make the completed products sold by it. The same questions arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118 decided by this board on March 12, 1947, and the case of *Wheeling Steel Corporation v. Glander*, No. 9681 decided by this board April 7, 1947. Reference is hereby made to the entries in those cases and also to the case of *National Distillers Products Corporation v. Glander*, No. 9095 with reference to a franchise tax assessment decided on March 12, 1947.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio."

The company insists that there is a total lack of integration of the accounts receivable with that part of the company's total business which is conducted in Ohio. This court finds that it cannot agree with this contention. In

this and the other cases the decisions of the Board of Tax Appeals must be affirmed.

Decisions affirmed.

Weygandt, C. J., Turner, Matthias, Hart, Zimmerman, Solingen and Stewart, JJ., concur.

[fol. 113] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 114] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed August 16, 1948

Now comes National Distillers Products Corporation, the appellant in the above styled cause, and hereby makes application for rehearing this case for the following reasons:

(1) The opinion and decision of the court decide adversely to the appellant the question of whether the taxation of the intangible personal property in question under the stipulation of facts in this cause constituted a violation of the rights secured to appellant by the Constitution of the United States without recognition by the court that the question of the applicability of the interstate commerce clause, Section 8 of Article I of the Constitution of the United States, had been raised by this appellant, whereas such question was raised and presented to this court both in the assignment of errors and in the brief of appellant herein;

(2) The opinion and decision of the court in this case should be examined and reconsidered in the light of the [fol. 115] decision of the Supreme Court of the United States in *Memphis Natural Gas Company v. Stone*, 92 L. Ed., 1409, decided June 21, 1948, approving and amplifying the principles of law announced in the cases of *Freeman v. Hewit*, 329 U. S., 249, 91 L. Ed., 265 and *Joseph v. Carter & Weekes Stevedoring Company*, 330 U. S., 422, 91 L. Ed., 993; said decision in *Memphis Natural Gas Company v.*

Stone, supra, was announced subsequently to the filing of briefs and the oral argument in this case;

(3) The attention of the court is respectfully called to the fact that its opinion virtually adopted the opinion and decision of the Board of Tax Appeals in this case, whereas said opinion and decision of the Board of Tax Appeals specifically omitted consideration of the constitutional questions involved herein, for the reason that said board was of the opinion that it did not have authority to consider and pass upon constitutional questions;

(4) The decision is of public and great general interest in this state, in that it presents a definition of "business situs" of intangible personal property which has hitherto not been adopted by any court of last resort of any state in the United States or by the Supreme Court of the United States; such definition of "business situs" makes no requirement of any local incident of taxable situs except such necessary local element of sale as is inextricably connected with interstate commerce;

(5) The decision of the court in upholding the application [fol. 116] of Section 5328-2 of the General Code of Ohio to the intangible personal property of appellant as set forth in the stipulation of facts filed herein is violative of Section 8 of Article I of the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States and Section 1, 2 and 19 of Article I of the Constitution of the State of Ohio;

(6) The attention of the court is respectfully called to the fact that in its opinion there is no discussion of the important argument of appellant with respect to the violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States inherent in the taxation of intangible personal property in this case, except in the reliance of the court upon the decision in *Parke, Davis and Company v. City of Atlanta*, 200 Ga., 296, 36 S. E. (2d), 773, which case was never reviewed by the Supreme Court of the United States; further, that there was no discussion in the opinion of the court of the several important decision of the Supreme Court of the United States cited by this appellant in its brief with respect to the application of the equal protection clause of the Constitution

of the United States to facts analogous to those in the instant case;

(7) The factual premise upon which the opinion and decision of the court is based is erroneous, it is respectfully submitted, for the reason that such premise assumes that sales were made by appellant from stocks of goods maintained in Ohio, whereas in the stipulation of facts filed [fol. 117] herein, it is stated that at the only plant of appellant located in the State of Ohio no whiskey was rectified, blended or bottled for inventory for shipping against future orders; thus, that no stock of goods was in fact maintained in Ohio from which sales were made;

(8) The decision of the court on the appeal of the appellant from the decision of the Board of Tax Appeals is of great public interest to the state and the people therein, and particularly to taxpayers engaged in interstate commerce involving interstate sales in Ohio and elsewhere, as directly involving the power of the State of Ohio to levy a tax on accounts receivable of a foreign corporation, which accounts receivable have arisen from sales made in interstate commerce and the proceeds of which are used generally in the business of such foreign corporation.

Appellant, being desirous of bringing the foregoing to the court for its consideration, respectfully submits this application for a rehearing.

(S.) Isadore Topper, 17 South High Street, Columbus 15, Ohio; Attorney for Appellant.

[File endorsement omitted.]

[fol. 118] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT
OF TAXATION OF OHIO

No. 11118

NATIONAL DISTILLERS PRODUCTS CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee

SECRETARY'S CERTIFICATE—Filed April 18, 1947

I hereby certify the attached to be a true and correct transcript of the record of the proceedings of the Board of Tax Appeals of the Department of Taxation of Ohio

pertaining to the decision complained of and all the evidence offered to and considered by the Board of Tax Appeals in making such decision.

(S.) Edward J. Kirwin, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 119] BEFORE BOARD OF TAX APPEALS OF OHIO

ABSTRACT OF DOCKET

No. 11118

Appellant: National Distillers Product Corporation.

Appellee: C. Emory Glander, Tax Commissioner of Ohio.

Attorneys: Isadore Topper, Columbus, Ohio, on behalf of the appellant. Hon. Hugh S. Jenkins, Attorney General of Ohio, and Daronne R. Tate, Assistant Attorney General, on behalf of the appellee.

Filed: January 16, 1946.

Nature of Appeal: Intangible personal property tax assessment.

Date of Hearing: Stipulation of Facts—March 18, 1946.

Journal Entry: March 12, 1947.

Appealed to Supreme Court: April 2, 1947.

[fol. 120] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION, STATE OF OHIO

[Title omitted]

NOTICE OF APPEAL AND PETITION ON APPEAL—Filed January 16, 1946

Now comes the appellant, National Distillers Products Corporation, and hereby gives notice that it is appealing from a finding, determination, assessment and order made by the appellee, C. Emory Glander, Tax Commissioner of the State of Ohio on January 8, 1946 to the Board of Tax Appeals, and the appellant hereby appeals to the Board of Tax Appeals for a review and redetermination of the finding, determination, assessment and order made and issued by

the appellee, C. Emory Glander, Tax Commissioner of the State of Ohio, on January 8, 1946 and which finding, determination assessment and order made by the appellee reads as follows:

[fol. 121] "DEPARTMENT OF TAXATION OF OHIO

No. 2498

In the Matter of the Application of the NATIONAL DISTILLERS PRODUCTS CORPORATION, (INTER-COUNTY), New York, N. Y., for Review and Redetermination for the year 1944

Jan. 8, 1946.

The application of the National Distillers Products Corporation, (Inter-County), New York, N. Y., for review and redetermination of an additional intangible personal property tax assessment against such applicant for the year 1944, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that part of the assessment complained of imposed an additional tax upon the applicant in that certain of its "accounts receivable" were given an Ohio situs for the purpose of computing its "net taxable credits" for the year here under consideration, whereas the applicant had not allocated any of its "receivables" into Ohio for such purpose.

The Tax Commissioner, being further advised in the premises, and in view of the decision of the Ohio Supreme Court in the case of Ransom & Randolph vs. Evatt, 142 O.S. 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code, finds that the assessment as heretofore made by this department with respect to the item of "net taxable credits" was in every respect proper.

The applicant at the time of said hearing contested the validity of such assessment with respect to allocating to Ohio certain of its "accounts receivable" on the grounds that the provisions of Section 5328-2, General Code, are not applicable and further that the construction of Sections 5328-1 and 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the 14th Amendment to the Constitution of the United States and the Constitution of the State of Ohio for, as construed, such sections operate to

tax intangible property of a non-resident over which Ohio has no jurisdiction and which has no business situs in Ohio. As to such contention, the Tax Commissioner holds that he is without authority to set aside Acts of the Legislature on constitutional grounds.

In addition to the foregoing contentions the applicant at the time of such hearing also raised the issue that the assessment was illegal and improper in that the "accounts receivable" which this department allocated to Ohio did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the [fol. 122] General Code. It is the holding of the Tax Commissioner that the "receivables", as heretofore allocated to Ohio, did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.

In view of the foregoing, it is therefore, ordered by the Tax Commissioner that the application for review and re-determination be and the same is hereby denied.

Department of Taxation. (S.) C. Emory Glander,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

(S.) Emory Glander, Tax Commissioner."

Appellant says there is error in said record and proceedings before the appellee, C. Emory Glander, Tax Commissioner of the State of Ohio, in this, to-wit:

1. The appellee erred in denying the application of the appellant for review and correction of an additional intangible personal property tax assessment made against the appellant for the year 1944;

2. The appellee erred in finding and determining that the accounts receivable of the appellant, a foreign corporation, arising out of sales made and completed in other states by its agents in other states and delivered in other states from goods manufactured in Ohio had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

3. The appellee erred in finding and determining that the accounts receivable of the appellant, a foreign cor-

poration not used in or arising out of business transacted [fol. 123] in Ohio, had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

4. The finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were taxable in Ohio is contrary to sections 5328-1 and 5328-2 of the General Code of Ohio;

5. The finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of section 8 of Article 1 of the 14th Amendment to the Constitution of the United States, and sections 1 and 19 of Article I of the Constitution of the State of Ohio;

6. The finding, determination, assessment and order of the appellee is unreasonable and unlawful.

Wherefore, appellant prays that the Board of Tax Appeals, upon hearing this appeal, will find and determine that the order of the appellee denying the application of the appellant for a review and redetermination of the additional intangible personal property tax assessment made against the appellant for the year 1944 by the appellee was issued in error, and that the finding, determination, assessment and order of the appellee, C. Emory Glander, Tax Commissioner of the State of Ohio, be reversed, vacated and set aside, and that the appellee be ordered to make and correct his assessment in conformity with the order of the Board of Tax Appeals.

(S.) Isadore Topper, Attorney for Appellant, 306
Huntington Bank Building, Columbus 15, Ohio.

[File endorsement omitted.]

[fol. 124] BEFORE DEPARTMENT OF TAXATION OF OHIO

Appeal No. 11118

In the matter of the Appeal before the Board of Tax Appeals filed by THE NATIONAL DISTILLERS PRODUCTS CORPORATION AND W & A GILBEY, LTD.—Inter-county—1944 personal property tax return

CERTIFICATE OF TAX COMMISSIONER

I hereby certify that the papers hereto attached are a complete transcript of the record of the proceedings before the Tax Commissioner of Ohio, together with all evidence, documentary and otherwise, considered by him in connection with the assessment therein described.

Department of Taxation, (S.) C. Emory Glander,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation this day taken by the Tax Commissioner with respect to the above matter.

(S.) C. Emory Glander, Tax Commissioner.

Filed Feb. 19, 1946, Board of Tax Appeals.

[fol. 125] EMORY GLANDER, TAX COMMISSIONER, DEPARTMENT
OF TAXATION, STATE OF OHIO

Preliminary Assessment Certificate No. 1289

In the matter of the application for Review and Redetermination of the NATIONAL DISTILLERS PRODUCTS CORP. 120 Broadway, New York, New York

APPLICATION FOR REVIEW AND REDETERMINATION

Now comes the National Distillers Products Corporation, and herewith makes application for review and redetermination of the personal property tax assessment for the year 1944 made against it on December 5, 1945, based on the

decision of the Supreme Court of Ohio in Ransom and Randolph v. Evatt, 142 O. S. 398 for the following reasons:

1. No personal property (credits) taxable in Ohio was omitted from its 1944 return;

2. That the credits taxed by the preliminary assessment certificate issued on December 5, 1945 against the undersigned corporation, a foreign corporation, with its principal office and place of business outside the State of Ohio, arose out of sales made and completed in other states, with the said accounts receivable payable outside of Ohio, and the avails thereof used outside of Ohio;

3. That the aforesaid credits, taxed by the aforesaid preliminary assessment certificate issued on December 5, 1945 did not arise out of business transacted in Ohio and were not used in Ohio;

[fol. 126] 4. That the determination and assessment made by the Tax Commissioner that the aforesaid accounts receivable of the National Distillers Products Corporation are allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of Section 8 of Article I of, and the 14th Amendment to the Constitution of the United States, and in Section 1 and 19 of Article I of the Constitution of the State of Ohio.

National Distillers Products Corporation; by:
Sec-Treas. (S.)—, —.

[fol. 127] BEFORE DEPARTMENT OF TAXATION OF OHIO

No. 2498

In the matter of the Application of the NATIONAL DISTILLERS PRODUCTS CORPORATION (Inter-county) New York, New York, for Review and Redetermination for the year 1944.

DECISION OF TAX COMMISSIONER—JAN. 8, 1946

The application of the National Distillers Products Corporation, (Inter-county), New York, New York, for review and redetermination of an additional intangible personal property tax assessment against such applicant for the year

[fol. 130]

National Distillers Products Corp.
and
W. A. Gilbey, Ltd.

1944		1944 Return	
	National Distillers	A Deductions	C Receivables and Prepaid
B/S Line 17	Notes and/or Accts. Rec.		\$13,969,267.00
B/S Line 40	Prepaid Insurance		470,316.00
B/S Line 41	Prepaid Taxes		40,200.00
B/S Line 43	Prepaid Others		291,674.00
			<hr/>
			14,771,457.00
B/S Line 95	Notes Payable	\$ 35,931.00	
	98 Trade Payables	*3,644,962.00	
	102 Acc'd Interest	321,045.00	
	107 Acc'd Other	-1,685,959.00	
	116 Dividends Payable	1,022,724.00	
			<hr/>
Total Deductions			6,710,621.00
Credits C-A			8,060,836.00
Credits taxable in Ohio 34.2091% (Bus. Fraction)			2,757,540.00
Tax @ 3M			8,272.62

* B/S amount of Accts. Payable was reduced by the amount of Accts. Rec. shown on W & A Gilbey B/S \$281,544.00

1944

W & A Gilbey, Ltd.

B/S Line 13	* Notes and/or Accts Rec.		-0-
B/S Line 40	Prepaid Insurance		1,239.00
B/S Line 41	Prepaid Taxes		1,220,128.00
B/S Line 43	Prepaid Other		1,034.00
			<hr/>
			1,222,401.00
B/S Line 95	Notes Payable	750,000.00	
	98 Trade Payable	133,210.00	
	107 Acc'd Other	17,149.00	
			<hr/>
Total Deductions			900,350.00
Credits C-A			322,051.00
Credits taxable in Ohio 74.2537% (Bus. Fraction)			239,130.00
Tax @ 3M			717.39

* Notes and/or Accts. Rec. in amount \$281,554.00 were entirely eliminated as these accts. were owned by the parent company.

National	\$2,757,540.00
Gilbey	239,130.00
	<hr/>
Total	2,996,670.00
Tax @ 3M	8,990.01

1944, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that part of the assessment complained of imposed an additional tax upon the applicant in that certain of its "accounts receivable" were given an Ohio situs for the purpose of computing its "net taxable credits" for the year here under consideration, whereas the applicant had not allocated any of its "receivables" into Ohio for such purpose.

The Tax Commissioner, being further advised in the premises, and in view of the decision of the Ohio Supreme Court in the case of *Ransom and Randolph v. Evatt*, 142 O. S., 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code, finds that the assessment as heretofore made by this department with respect to the item of "net taxable credits" was in every respect proper.

[fol. 128] The applicant at the time of said hearing contested the validity of such assessment with respect to allocating to Ohio certain of its "accounts receivable" on the grounds that the provisions of Section 5328-2, General Code, are not applicable and further that the construction of Sections 5325-1 and 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the 14th amendment to the Constitution of the United States and the Constitution of the State of Ohio for, as construed, such sections operate to tax intangible property of a non-resident over which Ohio has no jurisdiction and which has no business situs in Ohio. As to such contention, the Tax Commissioner holds that he is without authority to set aside acts of the legislature on constitutional grounds.

In addition to the foregoing contentions the applicant at the time of such hearing also raised the issue that the assessment was illegal and improper in that the "accounts receivable" which this department allocated to Ohio did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the Tax Commissioner that the "receivables", as heretofore allocated to Ohio, did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.

(Here follow 3 photographs, side folios 131, 132, 133)

In view of the foregoing, it is, therefore, ordered by the Tax Commissioner that the application for review and redetermination, be and the same is hereby denied.

[fol. 129] Department of Taxation, (S.) C. Emory Glander, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

C. Emory Glander, Tax Commissioner.

(Here follows 1 Photolithograph, side folio 129½)

[fol. 134] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT
OF TAXATION, STATE OF OHIO

[Title omitted]

STIPULATION OF FACTS—Filed March 18, 1946

The parties, by their respective counsel, hereby stipulate and agree that the stipulations hereinafter contained are true, to the extent that they are relevant and competent to the issues in the case at bar, and may be considered as proven; reserving, however, to each of the parties the right to raise objections to any stipulation herein contained on the grounds of relevancy or competency, and reserving further to each of such parties the right to offer additional testimony not inconsistent with the stipulations herein contained and the issues.

1. National Distillers Products Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Virginia, in which state the stockholders hold their annual meetings.

[fol. 135] 2. National Distillers Products Corporation is qualified and licensed to do business as a foreign corporation in the State of New York, where since 1924 it has maintained its principal business office in the City of New York. Meetings of directors are held in its offices located in the City of New York. Dividends are declared and ordered to be paid at meetings of the directors held in the offices of the corporation in New York City. Dividend checks are drawn and distributed by the dividend distributing agent of the corporation located in New York City and are paid from funds on deposit in banks in the City of New York. The stock registrar and stock transfer agents of the corporation are also located in the City of New York.

3. The president, vice-presidents, treasurer, secretary and executives of the corporation have their offices in the City of New York. All of the business activities of the corporation are determined, directed, governed and controlled from the offices of the corporation located in the City of New York. All accounts payable are paid by checks prepared and signed in the offices of the corporation in New York City and are drawn on funds on deposit in banks in that city, except payroll checks and checks in payment of

STATE OF OHIO

Tax Form 905 V - Prescribed by
C. Emory Glander, Tax Commissioner

No. 1289

PRELIMINARY
ASSESSMENT CERTIFICATE
(TAX COMMISSIONER'S COPY)

Name National Distillers Products Corporation
 Street 120 Broadway
 Post Office New York, New York

N-11

Date 19

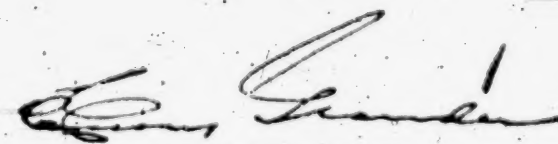
The Tax Commissioner hereby certifies that the following is the preliminary assessment of the taxable property of the above named taxpayer chargeable on the intangible property Tax List and Duplicate of the Auditor of State for the year 1944 - Dec. 5, 1945

CLASSIFIED TAX LIST				RET. FORM NO. 945			
				TOTAL	RATE	AMOUNT OF TAX	
Investments yielding income				\$	5%	\$	
Investments not yielding income					.002		
Deposits					.002		
Credits				2 996 670	.003	8 990 01	
Moneys and other Taxable Intangibles					.003		
TOTAL CLASSIFIED TAX				\$..	\$	

Assessment under decision of the Supreme Court of Ohio in the case of The Ransom and Randolph Company v. Evatt, Tax Commissioner (142 O. S. 398)
 No former assessment for this company

C O P Y

(SEAL)


 Tax Commissioner

129 1/2

Corporation Return of Taxable Property for ~~1948~~ 1944
Inter-County or Consolidated

IF A CONSOLIDATED RETURN IS FILED A CONSOLIDATING BALANCE SHEET, INCLUDING ALL CONTROLLED SUBSIDIARIES, IS REQUIRED.

NAME OF CORPORATION NATIONAL DISTILLERS PRODUCTS CORPORATION

This return is made by the above named corporation as holder of fifty-one per cent or more of the common stock of the following named corporations.

[illegible]

This corporation or (if this is a Consolidated return) one or more of its subsidiaries held at listing date personal property in the following counties in Ohio.

COUNTY	TAXING DISTRICT	Name under which business conducted in each location
--------	-----------------	--

INTANGIBLE PROPERTY

BONDS, NOTES, MORTGAGES, DEBENTURES, CONTRACTS, INVESTMENT TRUST SHARES, DEPOSITS (Outside Ohio bearing more than 4%), PROCEEDS OF MATURED INSURANCE, PATENT & COPYRIGHT ROYALTIES (Household Formula) ANNUITIES, INTERESTS IN TRUST FUNDS.

INVESTMENTS
YIELDING INCOME
SCHEDULE 6

INVESTMENTS
NOT
YIELDING INCOME
SCHEDULE 7

Name of Corporation, Debtor, Issuer, Trustee	Face Value	% in 1947	Income Yield in 1947	Quotation If Any	True Value Total
NONE					
TOTAL FROM INVESTMENTS YIELDING INCOME FROM FORM 912					
TOTAL INCOME YIELD—Schedule 6				XXXX	XXXX
TOTAL TRUE VALUE—Schedule 7				XXXX	XXXX

The corporation may elect to file with its return or mail to the Tax Commissioner at Columbus, Ohio a verified summary of its Federal Income Tax Return (Form 912) for the last preceding taxable year, together with a statement of the aggregate amount of income derived from investments taxable under Ohio laws, the income from which it is not required to report for federal income tax purposes. The reporting of income by the above method does not relieve the taxpayer from listing investments not yielding income in Schedule 7 above.

If the amount from investments, yielding income as shown on this return differs from the amount from like sources as shown on the Federal Income Tax Return of the Corporation, a statement must be attached explaining this difference.

If the corporation holds investments in its name as nominee a statement must be attached showing the issuer and the name and address of the actual owner.

SCHEDULE 8—DEPOSITS

CHECKING ACCOUNTS, SAVINGS ACCOUNTS, CERTIFICATES OF DEPOSIT OR WITHDRAWABLE STOCK OUTSIDE OHIO—held on November 12, 1947 and yielding 4% or less	\$
POSTAL SAVINGS HELD ON JANUARY 1, 1948	\$
TOTAL DEPOSITS	

SCHEDULE 9—COMPUTATION OF CREDITS TAXABLE IN OHIO

Balance Sheet Line No.	BALANCE SHEET ACCOUNTS	(A) TOTAL DEDUCTIONS	(B) OHIO RECEIVABLES & PREPAIDS	(C) TOTAL RECEIVABLES & PREPAIDS
13	Net Receivables—Due within one year from date of inception	XXXXXXX	\$	\$
20	Prepaid Items—Situated according to location: Insurance	XXXXXXX		
41	Taxes	XXXXXXX		
42	Interest	XXXXXXX		
43		XXXXXXX		
45	Other Intangible Items	XXXXXXX		
	TOTALS (B + C = % Ohio Location)	XXXXXXX	\$	\$
93	Current Notes Payable		XXXXXXX	XXXXXXX
98	Current Trade Accounts Payable		XXXXXXX	XXXXXXX
99	Current Other Accounts Payable		XXXXXXX	XXXXXXX
103	Accrued Interest Expense		XXXXXXX	XXXXXXX
107	Accrued—Other than Interest and Taxes		XXXXXXX	XXXXXXX
	TOTAL DEDUCTIONS	\$	XXXXXXX	XXXXXXX
	CREDITS — (C — A)	XXXXXXX	XXXXXXX	\$
	CREDITS TAXABLE IN OHIO (%)	XXXXXXX	\$ NONE	XXXXXXX

SCHEDULE 10—MONEY AND OTHER TAXABLE INTANGIBLES

CASH ON HAND OR IN SAFE DEPOSIT BOX (Not on Deposit in Financial Institutions)	
UNCOLLECTED CHECKS, JUDGMENTS, NON INTEREST ACCOUNTS Due after one year from date of inception	NONE
ALL OTHER TAXABLE INTANGIBLES	
NON TAXABLE BONDS AND SECURITIES REPRESENTING PROCEEDS OF TAXABLE PROPERTY CONVERTED AFTER OCTOBER 31, 1947	
DEPOSITS REPRESENTING PROCEEDS OF TAXABLE PROPERTY CONVERTED AFTER NOVEMBER 12, 1947, TO THE EXTENT HELD ON LISTING DAY	
TOTAL AMOUNT OF MONEY AND OTHER TAXABLE INTANGIBLES	

OATH

SECTION 1322 G. C.

The State of NEW YORK, County of NEW YORK, ss.:

THOS. A. CLARK

being duly sworn, deposes and says that he is

the TREASURER of The NATIONAL DISTILLERS' PRODUCTS Company that he executed the foregoing report in the name of and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make said statement, and to execute the same, by authority of the corporation and further, such corporation has not during the preceding year, directly or indirectly paid, used or offered, consented or agreed to pay or use, any of its money or property for, or in aid of, any political party, committee or organization, or for, or in aid of, any candidate for political office, or for nomination for any such office, or in any manner used any of its moneys or property for any political purpose whatsoever or for the reimbursement or indemnification of any person or persons for moneys or property so used, and that he is an officer of said corporation, having knowledge of the facts herein set forth, and that the statements contained in said report and in this affidavit are true.

THOS. A. CLARK /s/

Sworn to before me, and subscribed in my presence, this 30 day of March, A. D. 1944

Caroline Dietz /s/

Notary Public

Recapitulation of Classified or Intangible Personal Property

Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Investments Yielding Income	\$	5%	
Item 2 (From Schedule 7) Investments Not Yielding Income		.002	
Item 3 (From Schedule 8) Deposits		.002	
Item 4 (From Schedule 9) Credits	2996.670 - 8992.01	.003	
Item 5 (From Schedule 10) Money and Other Taxable Intangibles		.003	
Total Amount Aggregate Listed Value and Classified Tax		..	NONE

assessed under provisions of
the reapportionment of Ohio in the case
of R. v. Co. v. Enitt. 142 OS 393

N. L. S.

12/5/45

federal excise taxes. Payroll checks for plant employees, including those employed at the plant of the corporation located at Carthage, Hamilton County, Ohio, are paid with funds on deposit in banks in the locality in which the plants [fol. 136] are located. The funds for the payroll checking account for each plant are obtained through checks prepared and signed in the offices of the corporation in New York City and are drawn on funds on deposit in banks in that city. Checks for payment of all federal excise taxes are drawn on funds on deposit in banks in the localities in which the plants, including the plant of the corporation at Carthage, Hamilton County, Ohio, are located. The funds for the checking account for the payment of federal excise taxes for each plant are obtained through checks prepared and signed in the offices of the corporation in New York City and are drawn on funds on deposit in banks in that city. All accounts receivable of the corporation are posted in the books of the corporation kept in New York City and are payable at the offices of the corporation in New York City, where it deposits all of its receipts and moneys.

The avails of the accounts receivable when deposited by the corporation in banks in New York City are commingled with other funds of the corporation on deposit in that city, and which commingled funds are used by the corporation in the operation of its business throughout the United States, including the State of Ohio.

4. National Distillers Products Corporation is engaged principally in the business of manufacturing and distributing alcohol, whiskey and other alcoholic beverages. The corporation owns, maintains, or operates distilling or rectifying plants and plant warehouses in the States of Maryland (one plant), Pennsylvania (two plants), Missouri (one [fol. 137] plant), Kentucky (eight plants), Illinois (one plant), New Jersey (one plant) and Ohio (one plant). The plants located in the States of New Jersey and Pennsylvania are operated by subsidiary companies. Shipments of products from those plants are made for the account of and are billed by National Distillers Products Corporation. The corporation also makes shipments of its products from stocks of merchandise maintained in warehouses located in Jersey City, New Jersey, Chicago, Illinois and San Francisco and Los Angeles, California.

5. During the calendar year of 1943 the products manufactured by the appellant at its various plants were sold and distributed in all the states where such products could be legally distributed and sold.

The corporation, for the purpose of distributing and selling its products, publishes and issues and distributes two sets of price lists. One price list goes to licensees in states in which the sale and distribution of alcoholic beverages is permitted under licenses issued either by state or local governments. The conditions of sale listed in the open-state price list are the following:

“Conditions of Sale

1. Prices are F. O. B. Shipping Points.
2. Prices do not include State Taxes.
3. Any car requiring shipment from or to more than one point will carry a stop-over charge.
4. All orders should be forwarded to the Regional Sales Office for transmittal to New York.
5. All orders and contracts are subject to acceptance by the New York Office.
- [fol. 138] 6. All prices are subject of change without notice.
7. Terms, on approved credits. Net 30 days.
8. Freight charges will be added when brands are shipped from any point other than shown above.

Special Conditions Concerning Imported Products

9. We reserve the right to reduce quantities, either before or after acceptance of orders.
10. All orders for Ron Merito, accepted by us, are subject to actual arrival at Atlantic or Gulf Ports and also to delay or other conditions beyond our control.
11. Customers who place orders for Ron Merito on an F. O. B. Atlantic or Gulf Port basis must accept delivery on an L. C. L. basis from port of entry, when necessary.”

The other price list is distributed to state liquor administrators or boards in the 17 states in which the distribution and sale of alcoholic beverages is a state monopoly. The conditions of sale for its products set forth in the price

list for monopoly states, including the State of Ohio, are as follows:

"Conditions of Sale

1. Prices are F. O. B. Shipping Points.
2. Prices do not include State Taxes.
3. Any car requiring shipment from or to more than one point will carry a stop-over charge.
4. All orders should be forwarded to New York.
5. All orders and contracts are subject to acceptance by the New York office.
6. All prices are subject to change without notice.
7. Terms. Net, 30 days from date of invoice.
8. Freight charges will be added when brands are shipped from any point other than shown above:

Special Conditions Concerning Imported Products

9. We reserve the right to reduce quantities, either before or after acceptance of orders.

10. All orders for Ron Merito, accepted by us are subject to actual arrival at Atlantic or Gulf ports and [fol. 139] also to delay or other conditions beyond our control.

11. Customers who place orders for Ron Merito on an F. O. B. Atlantic or Gulf Port basis must accept delivery on an L. C. L. basis from port of entry, when necessary.

6. The corporation maintains regional sales offices in various cities in the so-called open states wherein the sale and distribution of alcoholic beverages is permitted under licenses issued by either state or local governments. Sales contracts are negotiated and orders are taken for the open states at the regional sales offices. All sales contracts or orders solicited or taken through the regional sales offices are subject to acceptance or rejection at the offices of National Distillers Products Corporation in New York City. National Distillers Products Corporation does not maintain a regional sales office in Ohio. Orders received from customers in open states at regional sales offices are forwarded to New York City along with the regional sales office form, a copy of which is sent to the customer. This regional sales

office form is purely a memorandum and on it is typed the following:

"Subject to approval of New York office."

"This is not a confirmation. It is only a memorandum of order we have filed with our New York office. It is subject to their acceptance as well as ability to fill it."

These memorandum orders are received from the regional sales office and if approved and accepted, are stamped at New York City:

"Approved New York sales office."

The regional sales offices in the States of Illinois and California are allowed to deliver directly to customers [fol. 140] whose credit previously had been approved by the New York City office, products of the corporation from stocks of merchandise maintained in warehouses in those states. All accounts receivable arising from such sales and deliveries are posted in the books of the corporation in New York City and are payable at the offices of the corporation in that city.

7. Orders for its products from monopoly states, including Ohio, are forwarded directly to the offices of the corporation in New York City and are subject to acceptance or rejection at the New York City offices of the corporation.

8. After the orders, either from open states or monopoly states, are approved at the offices of the corporation in New York City, the production department, with offices located in New York City, makes up and issues shipping orders which are forwarded to the various plants throughout the United States and from which plants products of the corporation are shipped to its customers, either in open or monopoly states. The shipping orders made up and issued by the production department in New York City are based upon the orders of customers filed, accepted and approved by the company at its New York offices. The shipping orders, before they are forwarded to the various plants of the corporation, are first approved by the credit department of the corporation located in New York City. The plants are not permitted to make any shipments unless confirmed by shipping orders received from the New York office of the production department.

[fol. 141] 9. All invoices are headed:

"National Distillers Products Corporation
120 Broadway
New York, New York"

and a note on the customer's copy of the invoice reads:

"Make all checks payable to
National Distillers Product Corporation
120 Broadway
New York, New York"

All books of accounts and evidences of accounts receivable with its customers are maintained in the office of the corporation at New York City, and all accounts receivable are supervised and followed for collection by the credit department located at 120 Broadway, New York, New York. Customers' checks in payment of accounts are received at, deposited in and cleared by banks located in the City of New York. However, if a check should be sent to either a plant or regional sales office, it is either forwarded to New York or is deposited in a special account and is subject to withdrawal only by an officer of the corporation located in its offices in New York City.

10. During the calendar year of 1943 the corporation shipped \$166,044,832.00 worth of its products from all of its plants and warehouses throughout the United States wherever manufactured. During the same year, on orders made up and issued by the office of the production department at New York City to fill orders solicited or taken by its agents or employees in states other than Ohio, the corporation shipped \$56,819,430.00 worth of its products from its plant and plant warehouses in Ohio to customers throughout the United States; that the corporation paid [fol. 142] real estate taxes on its plant and plant warehouses in Ohio and personal property taxes on its machinery, equipment and other tangible personal property in Ohio, including its products (whether in bulk or in cases) and which products subsequently were shipped from its Ohio plant warehouses to its customers in other states on orders solicited and accepted by its agents and employees in such other states.

11. During the calendar year 1943 the corporation stored in government-bonded warehouses owned and operated by

the corporation in Hamilton County, Ohio, in the process of manufacturing whiskey in barrels for the purpose of aging; that during the calendar year 1943 the corporation withdrew bulk whiskey kept in the aforesaid warehouses for the purpose of being blended, rectified and bottled to fill orders solicited and handled as set forth in paragraphs 5, 6, 7, 8 and 9 herein; that approximately ninety (90) percent of the whiskey shipped in cases from the plant of the corporation at Carthage, Ohio to customers and to warehouses of the corporation in other states was blended, rectified or bottled only upon receipt of shipping orders forwarded from the office of the corporation in New York City; that, the remaining approximately ten (10) percent of the whiskey shipped in cases from the plant of the corporation at Carthage, Ohio, to customers and to warehouses of the corporation in other states, was filled from goods shipped into Ohio from other plants of the corporation located outside of Ohio for the purpose of being transshipped from Carthage, Ohio, with other goods manufactured by the corporation at its plant at Carthage, Ohio, and that no whiskey was rectified, blended or bottled for inventory for shipping against future orders.

12. The corporation, for the tax year 1944, filed its annual report for personal property tax purposes, a true and correct copy whereof is included in the transcript of the proceedings before the appellee; that the corporation in its annual report to the state of Ohio did not allocate any of its accounts receivable to the state of Ohio; that thereafter the tax commissioner corrected said annual report by ascribing an Ohio situs to accounts receivable of \$2,996,670.00 in determining and assessing the intangible personal property tax of the corporation; that for the purpose of this appeal the corporation stipulates that 34.2191 percent of all of its accounts receivable for the calendar year 1943 arose from sales of its products which were shipped from its plant and plant warehouses in Ohio to customers throughout the United States; that said accounts receivable arose out of sales to its customers of its products manufactured in its plant in Ohio on orders solicited, received, accepted and filled as set forth in paragraphs 5, 6, 7, 8 and 9 herein; that a true and correct copy of the additional assessment certificate made and issued by the appellee is included in the transcript of the proceedings before the appellee; that the

appellee subsequently denied the application of the appellant for review and correction of the determination and assessment made by the appellee and that the action of [fol. 144] the appellee resulted in an additional intangible personal property tax in the sum of \$8,990.01 being assessed against the appellant; and that during the tax year 1944 the appellant did not pay in the State of Virginia nor in the State of New York personal property taxes on the accounts receivable involved herein and assigned an Ohio situs by the appellee.

Respectfully submitted, (S.) Isadore Topper, Attorney for Appellant. (S.) Hugh S. Jenkins, Atty. General; (S.) Daronne R. Tate, Asst. Atty. Gen., Attorneys for Appellee.

[File endorsement omitted.]

[fol. 145] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION OF OHIO

No. 11118

NATIONAL DISTILLERS PRODUCTS CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee

DECISION—March 12, 1947

This cause and matter came on for consideration by the Board of Tax Appeals upon an appeal filed herein by the appellant, above named, from a final order of the tax commissioner denying an application theretofore filed by the appellant for the review and correction of an additional intangible personal property tax assessment in the amount of \$8,990.01 made against it for the tax year 1944. The case was heard and submitted to the Board upon said appeal, on a transcript of the proceedings before the tax commissioner relating to the additional tax assessment made against it, upon a stipulation of the facts in the case and on the briefs and arguments of counsel.

It appears from the facts thus presented that appellant is a corporation organized and existing under the laws of

the State of Virginia where its stockholders' meetings are held. The principal business of the corporation is in the City of New York where all of its executive offices are located; and all of its business activities are governed and [fol. 146] controlled from its offices in New York. All of its accounts payable were paid from funds on deposit in New York. The corporation has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton County, Ohio; and it sells its products in every state where such products may be legally sold. Pay roll checks for employees of these several plants and checks for federal excise taxes due from said plants, including the one located at Carthage, Ohio were paid with funds on deposit in banks in these several localities where such plants are located. These funds were obtained through checks drawn at the office of the corporation in New York on banks in said city. All accounts receivable were posted in the books of the corporation in the City of New York where such accounts were payable and where all of its receipts were deposited.

The accounts receivable here in question, the allocation of which resulted in the additional intangible property tax assessment complained of, arose from the sale of products manufactured by the corporation at its plant in Carthage, Ohio, which products were shipped from a stock of goods maintained by the corporation at its Carthage, Ohio, plant to points in the State of Ohio and elsewhere throughout the United States. All orders for the sale of these products were solicited by agents outside of Ohio—no such sales agents being located in this State,—which orders were forwarded to New York and were subject to acceptance or rejection by the office of the corporation in said city. When such orders were accepted by the New York office, shipping orders were forwarded from that office to the Ohio plant from which the products were shipped to points in the State of Ohio and elsewhere pursuant to such sales orders so made and accepted; and no shipments or deliveries from the Ohio plant were made except those confirmed by such shipping orders. As above indicated, all checks in payment of the purchase price of the products of the company sold by the company and delivered from its plant at Carthage, Ohio, pursuant to such sales orders, were made payable to the company at its office in New York City. In this connection it does not appear that any of the accounts receivable or of the moneys received by the com-

pany in payment of the same were used by the company in connection with its business in Ohio as distinguished from the general business of the company; but on the contrary, it does appear that such accounts receivable and the avails thereof were used by the appellant in its business generally and wherever conducted.

From the stipulation of facts filed herein it appears that during the calendar year 1943 the corporation shipped \$166,044,382.00 worth of its products from all of its plants and warehouses throughout the United States wherever manufactured; and included in the aggregate amount and value of such products were products of the amount and value of \$56,819,430.00 which, during said calendar year, were shipped from its said plant and plant warehouses in [fol. 148] Ohio to customers throughout the United States.

It appears that the appellant, in filing its annual intangible and personal property return for the tax year 1944, did not allocate any of its accounts receivable to the State of Ohio; and that thereafter the tax commissioner, on audit of said annual return, corrected the same by ascribing an Ohio situs to a part of the accounts receivable of the appellant in the sum of \$2,996,670, which accounts receivable amounting to 34.2191% of all of its accounts receivable for the calendar year 1943, arose from sales of its products which were shipped from its plant and plant warehouses in Ohio to customers throughout the United States.

The question presented in this appeal as to whether or not the tax commissioner erred in allocating said accounts receivable to the State of Ohio and in including the same as a part of the taxable property of the appellant for the tax year 1944, requires a consideration of the pertinent provisions of section 5328-1 and 5328-2, General Code. Section 5328-1, General Code, which is the declaratory section with respect to the taxation of intangible property, provides generally that all moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in said section or as otherwise provided or exempted in the title of which this section is a part. This section further provides as follows:

“Property of the kinds and classes mentioned in section 5328-2 of the General Code (including accounts

receivable), used in and arising out of business trans-
 [fol. 149] acted in this state by, for or on behalf of a
 nonresident person * * * shall be subject to taxa-
 tion; and all such property of persons residing in this
 state used in and arising out of business transacted
 outside of this state by, for or on behalf of such persons
 * * * shall not be subject to taxation."

Section 5328-2, General Code, provides:

"Property of the kinds and classes herein mentioned,
 when used in business, shall be considered to arise out
 of business transacted in a state other than that in
 which the owner thereof resides in the cases and under
 the circumstances following:

"In the case of accounts receivable, when resulting
 from the sale of property sold by an agent having an
 office in such other state or from a stock of goods
 maintained therein, or from services performed by
 an officer, agent or employe connected with, sent from,
 or reporting to any officer or at any office located in
 such other state. * * *"

This Section further provides as follows:

"The provisions of this section shall be reciprocally
 applied, to the end that all property of the kinds and
 classes mentioned in this section having a business situs
 in this state shall be taxed herein and no property of
 such kinds and classes belonging to a person residing
 in this state and having a business situs outside of this
 state shall be taxed. It is hereby declared that the
 assignment of a business situs outside of this state to
 property of a person residing in this state in any case
 and under any circumstances mentioned in this section
 is inseparable from the assignment of such situs in this
 state to property of a person residing outside of this
 state in a like case and under similar circumstances.
 If any provision of this section shall be held invalid as
 applied to property of a non-resident person, such
 decision shall be deemed also to affect such provision
 as applied to property of a resident, but shall not
 affect any other provision hereof."

Section 5325-1, General Code, which defines the term "used in business" in connection with the taxation of [fol.150] tangible and intangible personal property, provides, among other things, as follows:

"Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Referring to the above quoted statutory provisions and, particularly, to the provision of section 5328-2, General Code, that "the provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this State shall be taxed herein and no property of such kinds and classes belonging to a person residing in this State and having a business situs outside of this State shall be taxed", it may be observed that these statutory provisions indicate a policy to treat, so far as possible, domestic corporations and other residents of this State on one hand, and foreign corporations and other nonresidents on the other hand, on a basis of equality with respect to the taxation of business intangibles. Although the term "business situs", as used in the above quoted provision of section 5328-2, General Code, is not therein further defined, we are admonished in and by the decision of the Supreme Court of this State in the case of *The Ransom & Randolph Company v. Evatt, Tax Commr.*, 142 O. S. 398, 408, that section 5328-2, General Code, fixes the business situs of accounts receivable [fol.151] and other classes of intangible property therein referred to, and that, for this purpose, effect is to be given to this statute rather than to any general rule which might otherwise be applicable to cases of this kind.

On the consideration of the case of *The Ransom & Randolph Company v. Evatt*, when the same was before the Board of Tax Appeals for decision, 25 O. O. 253, which case involved the question as to the taxable situs of the accounts receivable of an Ohio corporation which arose in the transaction of the business of the company in the States of Indi-

ana and Michigan, this Board was required to construe and apply the statutory provisions above quoted and particularly the provision of section 5328-1, General Code, that "all such property (accounts receivable and other kinds and classes of intangible property mentioned in section 5328-2, General Code) of persons residing in this State used in and arising out of business transacted outside of this State by, for or on behalf of such persons, . . . shall not be subject to taxation". On a consideration of the statutory provisions above noted, the Board of Tax Appeals was of the view that before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicile of the taxpayer, it must appear that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other state, but were therein so used as to become an integral part of the business carried on in such other state; and that it was not sufficient that such accounts receivable and other intangible property be used in business generally by the taxpayer. And on this view the Board held that the accounts receivable there in question, although they arose in the conduct of taxpayer's business in the States of Indiana and Michigan, did not have a business situs in such states, and that such accounts receivable were taxable in Ohio.

On the appeal of the decision of the Board of Tax Appeals in The Ransom & Randolph Co. case to the Supreme Court of Ohio, that Court reversed the decision of the Board of Tax Appeals upon the point above indicated. 142 O. S. 398, 404. That Court, upon consideration of the applicable provisions of section 5328-2 and related sections of the General Code above noted, held that the accounts receivable of a taxpayer which arose in the conduct of its business in a state or states other than the state in which it had its domicile or place of residence, had a business situs in such other state or states if such accounts receivable or the avails thereof are being applied or are intended to be applied in the conduct of the taxpayer's business, whether in this State or elsewhere. This view of the Supreme Court as to the construction to be placed upon the statutory provisions here in question was later followed by that Court in its decisions in the cases of The Haverfield Company v. Evatt, Tax Commr., 143 O. S. 58, and National Cash Register Company v. Evatt, Tax Commr., 145 O. S. 597.

[fol. 153] The appellant, as a corporation organized and existing under the laws of the State of Virginia, is a legal resident of that state; and as to the appellant corporation the State of Ohio is "a state other than that in which the owner thereof resides" and "such other state" within the provisions of section 5328-2, General Code, fixing the status of accounts receivable and other tangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this State, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this Board hereby find—, in the conduct of its business in the State of Ohio by the sale of its products from a stock of goods located in this State, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this State or elsewhere, such accounts receivable have a business and taxable situs in the State of Ohio, as found and determined by the tax commissioner.

With respect to a question such as that here presented, to wit, that as to the taxation of the accounts receivable of a foreign corporation arising in the conduct of its business in this State, the application of the above noted provisions of sections 5328-1, 5328-2 and other related sections of the General Code, as the same have been construed by the Supreme Court, presents, to our mind, a serious question as to the constitutionality of said statutory provisions as so construed under the Due Process of Law clause of [fol. 154] the Federal Constitution. However, as to this, it is fair to state that recently the Supreme Court of the State of Georgia in the case of *Parke, Davis & Co. v. Atlanta*, 200 Ga. 296, 163 A.L.R. 976, 36 SE (2d) 773, sustained a tax under the laws of that state on the accounts receivable of a foreign corporation which arose from the sale and delivery of its products from a stock of goods in the City of Atlanta in said state. The decision of the court on this point, as indicated by the syllabi in the report of such decision, is as follows:

"Where a foreign corporation kept a stock of goods in a warehouse in the City of Atlanta, Ga., orders were received and approved outside the state, which were filled by delivering goods from the warehouse to

resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the City of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by the non-resident owner, for the merchandise sold in the municipality, are passed upon as to the credit of customers, and the books of account are kept, at a point without the City of Atlanta and the State of Georgia.

"Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment on the Constitution of the United States, or paragraphs 2 and 3 of section 1 in article 1 of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon, and the books of account kept by the corporation at a point without the state."

[fol. 155] With respect to the constitutional aspects of the question here presented, the case of *Parke, Davis & Co. v. Atlanta*, *supra*, cannot be distinguished on the facts from the case at bar; for in that case, as in this, the accounts receivable which arose in the conduct of the taxpayer's business in the taxing state were not used otherwise than in the transaction of the taxpayer's business generally and as a whole.

Whatever the answer may be as to the constitutionality of the above quoted provisions of section 5328-1, 5328-2 and related sections of the General Code, as the same have been heretofore construed by the Supreme Court of this State, in their application to the facts of this case, it is quite clear that the Board of Tax Appeals, as an administrative and quasi judicial board or tribunal, has no jurisdiction and authority to consider and determine such constitutional question. See *Hillsborough Township v. Cromwell*, U. S. Sup. Ct., Case No. 197, 90 L. Ed. 298, 302; *Schwartz v. Essex County Board of Taxation*, 129 N.J.L.

129, 132, affirmed 130 N.J.L. 177. In the case last above cited it was said:

"It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body."

[fol. 156] The Board of Tax Appeals is, of course, bound by the above cited decisions of the Supreme Court of this State construing the above quoted statutory provisions as to the business situs of accounts receivable and other intangible property; and in this view the assessment and order of the tax commissioner complained of in this appeal is hereby affirmed.

Whereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

Edward J. Kirwin, Secretary.

[fols. 157-158] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 159] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD—
Filed December 6, 1948

Comes now the appellant in the above entitled cause and adopts its respective assignments of error as its statement of the points to be relied upon, and states that the whole of the record as filed is necessary for the consideration of the case.

National Distillers Products Corporation, Appellant,
by Isadore Topper, 17 South High Street, Colum-
bus 15, Ohio, Its Attorney.

Service upon the undersigned of the foregoing statement of points and designation of parts of record is acknowledged this 2d day of December, 1948.

C. Emory Glander, Tax Commissioner, State of Ohio,
Appellee; Aubrey A. Wendt, Assistant Attorney
General, State of Ohio, Counsel for Appellee.

[fol. 160] -[File endorsement omitted.]

[fol. 161] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 3, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 53,450. Ohio, Supreme Court. Term No. 448. National Distillers Products Corporation, New York, Appellant, vs. C. Emory Glander, Tax Commissioner of Ohio. Filed December 6, 1948. Term No. 448 O. T. 1948.

business" transacted outside of Ohio, and (2) that accounts receivable of a non-resident shall be subject to taxation in Ohio "when used in and arising out of business" transacted in Ohio, the Supreme Court of Ohio held in the case of *Ransom & Randolph Co. v. Evalt*, supra, that (pp. 407, 408, 409) to acquire a business situs outside of Ohio it is not necessary that accounts receivable be used principally in a state other than Ohio but that it is sufficient "if they or the avails thereof are being applied or intended to be applied in the conduct of the business, whether in this state or elsewhere", and arise from the sale of property sold by an agent having an office in a state other than Ohio or from the sale of property sold from a stock of goods maintained in a state other than Ohio. In other words, as they apply to accounts receivable of a resident of Ohio, Sections 5328-1 and 5328-2, General Code, do not require as a prerequisite of out of state situs that accounts receivable be integrated in a business in a foreign state, but require only that the receivables arise out of business done in a foreign state and be used generally in the business of the owner. Conversely, with respect of the accounts receivable of a non-resident, the statutes in question only require that the receivables arise out of business transacted in Ohio and be used generally in the business of the owner, whether in Ohio or elsewhere. Since accounts receivable arising out of an interstate business, or the proceeds from them, will inevitably be applied to the purposes of the business somewhere, the sole test of taxability prescribed by the state statutes is the place where the accounts arise.

Applying the statutes, as so construed, to the facts of the instant case, both the Tax Commissioner and the Board of Tax Appeals found that appellant's receivables, or the avails thereof, were being applied in the conduct of appellant's business in Ohio and elsewhere and arose from the sale of property sold from a stock of goods maintained in